TABLE OF CONTENTS

	Page
Complaint for Injunction	2
Exhibit "A": Decision and Direction of Election	11
Exhibit "B": Telegram Dated June 13, 1956, Ogden W. Fields to Jonas Silver of Mayer, Weiner and Mayer	18
Exhibit "C": Certification of Representatives	19
Motion of Defendants to Dismiss the Complaint or, in the Alternative, for Summary Judgment in Their Favor	20
Exhibit 1: Tally of Ballots	21
Cross-Motion of Plaintiff for Summary Judgment in Its Favor	23
Minute Entry of Clerk	23
Findings of Fact and Conclusions of Law	24
Order of December 19, 1956	31
Motion of Defendants to Drop Ivar H. Peterson as a Party Defendant	33
Order Dropping Ivar H. Peterson as a Party Defendant	34
Notice of Appeal	34
Designation of Contents of Record on Appeal	35

Proceedings in the U. S. C. A. for the District of Columbia Circuit 37
Opinion, Bazelon, J 37
Judgment 40
Clerk's certificate (omitted in printing) 40
Order allowing certiorari 41

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,701

BOYD S. LEEDOM, ET AL., individually and as Chairman and Members of and constituting the National Labor Relations Board, *Appellant*,

v.

WILLIAM KYNE, individually and as President of BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, a Voluntary Unincorporated Labor Organization, *Appellee*.

Appeal From the United States District Court for the District of Columbia

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JOINT APPENDIX

Filed July 12, 1956

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2909-'56

WILLIAM KYNE, individually and as President of BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, a Voluntary Unincorporated Labor Organization, P.O. Box No. 2528, Cheektowaga, New York, *Plaintiff*,

-against-

BOYD S. LEEDOM, ABE MURDOCK, IVAR H. PETERSON, PHILIP RAY RODGERS, STEPHEN S. BEAN, individually and as Chairman and Members of and constituting the NATIONAL LABOR RELATIONS BOARD, *Defendants*.

Complaint for Injunction

Plaintiff, for its complaint herein, alleges:

1. This action arises under the Labor Management Relations Act of 1947, 29 U.S.C. Sections 151 et seq., an Act of Congress regulating commerce. This Court has jurisdiction under 62 Stat. 931, 28 U.S.C. Section 1337.

2. This complaint is filed by plaintiff for the purpose of having this Court compel the defendants to direct a vote among professional employees to determine whether such professional employees wish to be included in a
2 bargaining unit with non-professional employees pursuant to Sections 9(b)(1) and 2(12) of said Act, 29 U.S.C. Sections 159(b)(1) and 152(12) as hereinafter more fully appears.

3. This action also arises under Sections 10(a), 10(b), 10(c), and 10(e) of the Administrative Procedure Act of 1946, 5 U.S.C. Sections 1001 et seq.

4. Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, is a voluntary unincorporated labor organization, maintaining its principal office for the transaction of its regular business at P.O. Box No. 2528, Cheektowaga, New York, and William Kyne is the President thereof.

5. Membership in Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, is open to all non-supervisory professional engineers and scientists employed at the Cheektowaga, New York, plant of Westinghouse Electric Corporation. Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, exists for the purpose of enhancing the economic and professional status of engineers and scientists who are professional employees as defined in Section 2(12) of the Labor Management Relations Act, 1947, 29 U.S.C. Section 152 (12), through collective bargaining with Westinghouse Electric Corporation.

6. Said Westinghouse Electric Corporation is engaged in an industry or activity affecting commerce within the meaning of Sections 2(6) and 2(7) of the Labor
3 Management Relations Act, 29 U.S.C. Sections 152(6) and 152(7).

7. On or about October 14, 1955, plaintiff filed a petition for certification of representatives with the Regional Director of the National Labor Relations Board for the Third Region, alleging that a substantial number of employees occupying the job descriptions of Engineer, Assistant, Engineer Associate, Engineer, Engineer Senior and Engineer Fellow, at the Cheektowaga, New York, plant of Westinghouse Electric Corporation, wish to be represented for purposes of collective bargaining by plaintiff, and plaintiff desires to be certified as representative of these employees pursuant to Sections 9(a) and (c) of the Labor Management Relations Act, 1947, 29 U.S.C. Sections 159(a) and 159(c).

8. Said petition was given Case No. 3-RC-1634 by the Regional Director of the National Labor Relations Board for the Third Region.

9. Upon the petition filed by plaintiff, hearing was conducted on March 7th and 8th, 1956 in Buffalo, New York, by an officer duly designated by the Regional Director of the National Labor Relations Board for the Third Region, pursuant to Section 9(c) of said Act, 29 U.S.C. Section 159(c). At the hearing, plaintiff, by amendment to its petition, sought to represent all professional employees within the meaning of Section 2(12) of said Act at the Cheektowaga, New York, plant of Westinghouse Electric Corporation including, in addition to the categories originally named in the petition, Manufacturing Engineer, Manufacturing Engineer Senior, Plant Layout Engineer, Methods Engineer and Purchasing Engineer.

10. At the hearing, Buffalo Salaried Employees Association, Incorporated, a labor organization, was permitted to intervene in the proceedings. The Intervenor alleged that employees at the Cheektowaga, New York, plant of Westinghouse Electric Corporation in the additional categories of Engineer Order Service, Engineer Test Record, Engineer Contact, Order Correspondent Master, and Safety Inspector were also professional employees within the meaning of Section 2(12) of said Act and should be included within the bargaining unit together with all the professional employees sought by the plaintiff in the amended petition.

11. On May 28, 1956, defendant, National Labor Relations Board, issued its Decision and Direction of Election in the aforesaid representation proceeding, finding that the employees in the categories sought to be included in the bargaining unit by plaintiff are professional employees within the meaning of Section 2(12) of said Act and that the employees in the categories of Engineer Order Service, Engi-

neer Test Record, Engineer Contact, Order Correspondent Master, and Safety Inspector are not professional employees within the meaning of Section 2(12) of said Act. In the aforesaid Decision And Direction Of Election, defendant, National Labor Relations Board, further found that all professional employees at the Cheektowaga, New York plant of Westinghouse Electric Corporation, including the categories of Engineer Assistant, Engineer Associate, Engineer, Engineer Senior, Engineer Fellow, Manufacturing Engineer, Manufacturing Engineer Senior, Plant Layout Engineer, Methods Engineer and Purchasing Engineer, as well as the non-professional Engineer, Engineer Order Service, Engineer Test Record and Engineer Contact, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Labor Management Relations Act, 1947, 29 U.S.C. Section 159(b). The defendant, National Labor Relations Board, despite the provisions of Section 9(b)(1) of said Act, nevertheless refused to direct a vote among the professional employees as such to decide whether or not they wished to be included in a unit together with the non-professional employees, as provided in Section 9(b)(1) of said Act. A copy of said Decision And Direction Of Election is hereto annexed as Exhibit "A".

12. In the aforesaid Decision And Direction Of Election, defendant, National Labor Relations Board, directed that an election be held within thirty days of the date of this Direction, among the employees in the aforesaid unit to determine whether or not they desire to be represented, for purposes of collective bargaining, by Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, by Buffalo Salaried Employees, Incorporated, or by neither.

13. On June 7, 1956, plaintiff filed a Motion To Stay Election, Reconsider And Amend Decision And Direction Of Election And Request For Oral Argument in the

aforesaid representation proceeding alleging that defendant, National Labor Relations Board, acted in excess of its statutory authority by including, in the same bargaining unit, professional and non-professional employees without having first accorded such professional employees an opportunity to determine by majority vote whether or not they wished to be included in such unit as required by Section 9(b)(1) of said Act.

14. On June 13, 1956, defendant, National Labor Relations Board, denied the aforesaid motion. A copy of said order denying plaintiff's motion is hereto annexed as Exhibit "B".

15. On June 14, 1956, an election by secret ballot was held under the direction of the Regional Director of the National Labor Relations Board for the Third Region among the employees in the aforesaid unit found to be appropriate by the Board, including the non-professional categories, without the professional employees having been first accorded an opportunity to determine by vote whether or not they wished to be included in such unit. The plaintiff received a majority of the valid votes cast.

16. On June 21, 1956, plaintiff was certified by the Regional Director of the National Labor Relations Board for the Third Region, acting on behalf of the defendant, National Labor Relations Board, as the exclusive bargaining representative of the professional and non-professional employees at the Cheektowaga, New York, plant of the Westinghouse Electric Corporation, including
7 employees in the categories set forth in the aforesaid bargaining unit. A copy of said certification is hereto annexed as Exhibit "C".

17. Sections 9(b) and 9(b)(1) of the Labor Management Relations Act, 1947, 29 U.S.C. Section 159(b) provide as follows:

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit;"

18. Although the aforesaid Section 9(b)(1) of the Labor Management Relations Act, 1947, provides that the National Labor Relations Board shall not decide that a bargaining unit of professional and non-professional employees is appropriate unless a majority of such professional employees vote for inclusion in such unit, the defendants, Boyd S. Leedom, Abe Murdock, Ivar H. Peterson, Philip Ray Rodgers and Stephen S. Bean, as members of the National Labor Relations Board, have determined that such bargaining unit is nevertheless appropriate and have certified plaintiff as exclusive bargaining representative of employees in such unit without first ascertaining the desires of the professional employees by vote as to whether or not they wish to be included in such unit with non-professional employees, thereby failing and refusing to comply with the aforesaid Section 9(b)(1) of the Labor Management Relations Act, 1947.

19. In refusing to direct a vote among such professional employees to determine whether or not they wish to be included in the unit with non-professional employees, the defendants, Boyd S. Leedom, Abe Murdock, Ivar H. Peterson, Philip Ray Rodgers and Stephen S. Bean, as members of the National Labor Relations Board, have exceeded the scope of their statutory authority and thereby have failed and refused to comply with Section 9(b)(1) of said Act,

and have thereby further acted arbitrarily, capriciously and not in accordance with law.

20. By reason of the wrongful acts and the unlawful withholding of action by defendants hereinabove complained of, plaintiff has been, is now, and in the future will be denied a right to be selected as exclusive representative in a bargaining unit of professional employees and excluding non-professional employees should a majority of such professional employees so desire, a right guaranteed to it by virtue of the laws of the United States, to-wit: Sections 9(b)(1) and 2(12) of the Labor Management Relations Act, 1947, and has been, is now, and will be denied the protection guaranteed to it by virtue of said law to its irreparable damage unless this Court exercise the power and authority vested in it to set aside in part the Decision And Direction Of Election issued by the Board in Case No. 3-RC-1634, and to order the defendants, Boyd
9 S. Leedom, Abe Murdock, Ivar H. Peterson, Philip Ray Rodgers and Stephen S. Bean, as members of the National Labor Relations Board, to conduct an election among the aforementioned professional employees to determine whether or not a majority of such professional employees wish to be included in a unit together with employees who are not professional employees, as required by Section 9(b)(1) of said Act.

21. The plaintiff herein has no adequate remedy at law and has no means for the redress of wrongs whereof it here complains, plaintiff having exhausted its administrative remedies, except through mandatory injunction proceedings to review the actions of the defendants and to order said defendants to set aside in part the Decision And Direction Of Election in Case No. 3-RC-1634 and to conduct an election pursuant to Section 9(b)(1) of said Act as hereinabove set forth and described in this complaint.

WHEREFORE, plaintiff prays:

(a) That a permanent injunction be granted and issued from this Court to the defendants, Boyd S. Leedom, Abe Murdock, Ivar H. Peterson, Philip Ray Rodgers and Stephen S. Bean, as members of the National Labor Relations Board, committing, requiring and compelling them and the National Labor Relations Board and all those acting under and by virtue of its authority to set aside in part the Decision And Direction Of Election, and to set aside and vacate the election conducted on June 14, 1956, and to set aside and vacate the certification of representatives dated June 21, 1956, in Case No. 3-RC-1634, and further enjoining the defendant, National Labor Relations Board, from processing the petition filed in Case No. 3-RC-1634, unless defendant, National Labor Relations Board, hereafter conducts its investigation in Case No. 3-RC-1634 to ascertain representatives for purposes of collective bargaining with Westinghouse Electric Corporation in the manner provided by Section 9(b)(1) of the Labor Management Relations Act, as amended.

(b) That such other and further relief be granted as this Court deems appropriate.

MAYER, WEINER & MAYER

By: ABRAHAM WEINER
partner
19 West 44th Street,
New York 36, N.Y.

JAFFEE & DUNAU

By SAMUEL H. JAFFEE
912 DuPont Circle
Building, N.W.
Washington 6, D.C.

VERIFICATION

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

ABRAHAM WEINER, being first duly sworn, on oath deposes and says that he has read the foregoing complaint by him subscribed; that he knows the contents thereof; and that he verily believes the matters therein set forth to be true.

ABRAHAM WEINER

MAYER, WEINER & MAYER
19 West 44th Street,
New York 36, N.Y.

Subscribed to and sworn before me this 10th day of July, 1956.

JEROME WENIG

Jerome Wenig
Notary Public State of New York
Qualified in New York County
No. 81 036 985
Commission Expires March 30, 1958

11 Exhibit "A"

115 NLRB No. 228 D-9891
Cheektowaga, New York

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 3-RC-1634

WESTINGHOUSE ELECTRIC CORPORATION, *Employer*

and

BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA,[1] *Petitioner*

Decision and Direction of Election

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Bernard Marcus, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[2]

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.[3]

---

[1] The name of the Petitioner appears as amended at the hearing.

[2] The hearing officer referred to the Board the motions to dismiss made at the hearing by the Intervenor. For the reasons set forth below, these motions and the motions to dismiss made in the Employer's brief are hereby denied.

[3] Buffalo Salaried Employees Association, Incorporated, herein called the Intervenor, was permitted to intervene in this proceeding on the basis of its contractual interest in the employees whom the Petitioner seeks to represent. The motion to intervene was granted without objection, but the Petitioner, later in the hearing and in its brief filed after the hearing, contended that the Intervenor had no standing as its most recent contract failed to reflect a change in its name. We find this contention without merit. Accordingly, the

3. The hearing officer referred to the Board the Petitioner's motion made at the hearing to amend the unit set forth in the petition.

12 The Employer and the Intervenor contend that the unit described in the petition is inappropriate, that the Petitioner's amendment of the proposed unit at the hearing was so substantial as to constitute a new petition, and that the contract entered into after the filing of the petition but before the amendment was therefore a bar.

The Petitioner's original proposed unit sought 5 categories of engineers, totaling 166 employees. The amendment to the petition would add 5 more categories of engineers totaling 67 employees. The parties stipulated that all the employees sought by the Petitioner are professional engineering employees. Under these circumstances, we find that the amendment did not constitute a new petition or affect the timeliness of the original filing.[4] The Petitioner's motion to amend the unit set forth in the petition is hereby granted. We find therefore that the contract is not a bar, and the motions to dismiss on this ground are denied. Accordingly, we find that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. The unit, as set forth in the petition, sought employees in the following job descriptions: engineer assistant, engineer associate, engineer, engineer senior, and engineer

---

Intervenor's Petition to Reopen Hearing, filed on April 30, 1956, to take evidence as to its change in name, is hereby denied.

The Petitioner and the Intervenor refused to stipulate that each was a labor organization within the meaning of the Act. We find that as both the Petitioner and the Intervenor are organizations which exist for the purpose of representing employees for collective bargaining purposes, they are labor organizations within the meaning of Section 2 (5) of the Act.

[4] *Hyster Company*, 106 NLRB 347, 348.

fellow. The unit, as amended at the hearing, sought all professional employees including, in addition to the categories named in the petition, manufacturing engineer, manufacturing engineer senior, plant layout engineer, methods engineer (formerly time and motion analyst), and purchasing engineer.

As stated above, the parties stipulated that employees in all the categories set forth in the amended unit are professional employees within the meaning of Section 2 (12) of the Act. None of the parties disputed the appropriateness of a unit of professional employees nor the inclusion in such unit of all the categories in the amended unit.[5] The parties were in disagreement, however, as to the unit placement of 5 additional categories: engineer order service, engineer test record, engineer contact, order correspondent master, and safety inspector.[6] The Intervenor maintained that the employees in these categories have professional status and should be included in the unit of agreed professional employees. The Petitioner maintained that the employees in these 5 categories are not professional employees as defined in Section 2 (12) of the Act, and should therefore be excluded. The Employer took no position at the hearing with respect to the unit placement of these disputed categories, which are not classified as professional by the Employer. In its brief filed after the hearing, however, the Employer main-

13

[5] Following a consent election in 1946 (3-R-1388), the Intervenor was selected by two voting groups of professional employees and of salaried nonprofessional employees. The parties in that proceeding having agreed that in such event the two groups would be combined in a single unit, the Intervenor was certified as the bargaining representative for such unit. The parties herein stipulated at the hearing that the Employer, the Intervenor, and another labor organization, which is not a party in the present proceeding, have entered into an agreement (3-RC-1595) for a consent election in a unit of the salaried nonprofessional employees.

[6] The parties stipulated that employees in the category of machine designer are not professional, and no contention was made that they should be included. Accordingly, they are excluded from the unit.

tained that employees in 4 of the disputed categories should be included in the unit because they "are so closely allied with and integrated in the engineering operations at the plant . . . ," but that the fifth category, safety inspectors, "are rather administrative, and probably should be excluded from any unit."

There are 5 employees in the *engineer order service* category, 1 in class A, 2 in B, and 2 in C. These employees progress on the basis of training and education from C to A, which is the highest classification. All 5 do similar work but handle proportionately more difficult assignments in the higher classifications. Their work requires electrical or mechanical knowledge and experience. They check customers' orders to determine the extent to which standard or special products are called for, and estimate the amount of engineering required in order to determine when delivery to the customer can be made.

14

In some instances they develop variations in standard designs themselves and then put the orders through the factory for production, but they refer more complicated problems to the admittedly professional design engineers. They work in the same room as the design engineers, and are in constant contact with them. They report to an engineering manager, as do the employees sought by the Petitioner. Although the Employer does not require, it prefers, engineering degrees for these jobs, and some men in this category have such degrees. Men have been transferred from this category to that of engineer.

There are 3 employees in the *engineer test record* category, 1 in class A and 2 in class B. They compile data received from the test floor on such matters as currents, voltages, watts, and temperatures, into prescribed forms. Using higher mathematics, they plot the data into curves which express torques and efficiencies, power factors, losses, and regulation. They are also responsible for preparing data on curves and other forms which go to the Employer's customers.

Their work brings them into frequent contact with design engineers. They work in the same section and under the same supervision as some of the design engineers. Although not required, some of these men have engineering degrees. A few men in this category have been transferred to jobs in the engineer assistant category.

There is 1 man in the *engineer contact* category, who is the liaison man between the design engineering department and the shop. He makes on-the-spot diagnoses of trouble in manufacturing or tests, can authorize some changes in design or material, and refers others to the design engineers. He also allocates the cost of a correction to the section responsible for the error. He works frequently with design engineers, is located in the same office, and reports to the same supervisor. His job does not require an engineering degree, but the work requires some engineering skill plus considerable experience with the employer's products. Men have moved from this work to jobs in categories stipulated to be professional.

There are 3 employees in the category of *order correspondent master*. They coordinate customer orders, which may run as large as 100 carloads in shipment. Their work requires familiarity with apparatus built at the plant here involved, at other Westinghouse plants, and at plants of other companies. They handle order service papers, obtain data as to availability of equipment from engineers and from Westinghouse district offices, and relay this information to the customers. They work in the same building as the engineering sections but in a separate office. Their work is under the supervision of the order service supervisor, who also supervises a number of order service correspondents and another group which handles renewal orders.

There are 2 employees in the category of *safety inspector*. They are responsible for maintaining safety in the plant.

When necessary, they design safety devices for machines. There are no formal educational requirements for these jobs. The office of the inspectors is in the industrial relations department, in the same building as the engineering department but on a different floor. They work under a supervisor of safety, who reports to the head of the industrial relations department.

We find, upon the basis of the entire record, that the employees in the 5 disputed categories are not professional employees within the meaning of Section 2 (12) of the Act. We find further, however, that employees in the 3 categories of engineer order service, engineer test record, and engineer contact, have had considerable education and experience in the engineering field, are occasionally transferred to the professional engineering categories, work in the same general area and under common supervision with the admittedly professional engineering employees, spend much of their time collaborating and consulting with these professional employees, and share a close community of employment interests with them. Furthermore, employees in these 3 categories were included with the admittedly professional engineers in the voting group in the 1946 election. Also, it does not appear that the addition of the 9 employees in these categories to the unit of 233 employees stipulated to be professional would destroy the predominantly professional character of such a unit. Under all the circumstances, we shall include these employees in the professional unit.[7] We do not, however, find that the order correspondent masters and safety inspectors share this mutuality of employment interests with those in the unit. They were not included with the engineers in the 1946 election, and we shall exclude them from the unit here found appropriate.

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[7] *Westinghouse Electric Corporation*, 111 NLRB 497, 501; *Westinghouse Electric Corporation*, 80 NLRB 591, 594.

Accordingly, we find that the following employees at the Employer's Cheektowaga, New York, plant constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act: All professional employees, including the categories of engineer assistant, engineer associate, engineer, engineer senior, engineer fellow, manufacturing engineer, manufacturing engineer senior, plant layout engineer, methods engineer (formerly time and motion analyst), purchasing engineer, engineer order service, engineer test record, and engineer contact, but excluding the categories of machine designer, order correspondent master, and safety inspector, all other employees, guards, and supervisors as defined in the Act.[8]

Direction of Election

As part of the investigation to ascertain representatives for the purposes of collective bargaining with the Employer, an election by secret ballot shall be conducted as early as possible, but not later than 30 days from the date of this Direction, under the direction and supervision of the Regional Director for the Region in which this case was heard, and subject to Sections 102.61 and 102.62 of National Labor Relations Board Rules and Regulations,
17 among the employees in the unit found appropriate in paragraph numbered 4, above, who were employed during the payroll period immediately preceding the date of this Direction of Election, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military services of the United States who appear in person at the polls, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election,

[8] In view of our unit finding above, which corresponds substantially to the unit in the amended petition, we deny the motion to dismiss on the grounds (1) that the unit set forth in the original petition is too limited, and (2) that the unit set forth in the amended petition is not comprehensive enough.

and also excluding employees on strike who are not entitled to reinstatement, to determine whether or not they desire to be represented, for purposes of collective bargaining, by Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, by Buffalo Salaried Employees Association, Incorporated, or by neither.

Dated, Washington, D. C., May 28, 1956.

BOYD LEEDOM, *Chairman*

ABE MURDOCK, *Member*

IVAR H. PETERSON, *Member*

PHILIP RAY RODGERS, *Member*

STEPHEN S. BEAN, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

---

18 Filed July 12, 1956

Exhibit "B"

WESTERN UNION

Telegram

1956 Jun 13 PM 2 32

NA 137 GOVT LONG PD-WUX NEW YORK NY 13 15 1P-
NY MAYER WEINER AND MAYER, ATT JONAS SILVER ESQ-
19 West 44 St-
-RE WESTINGHOUSE ELECTRIC CORP., 3-RC 1634. IT IS HEREBY ORDERED THAT THE PETITIONER'S MOTION TO STAY ELECTION, RECONSIDER AND AMEND DECISION AND DIRECTION OF ELECTION, AND REQUEST FOR ORAL ARGUMENT, THE INTERVENOR'S MOTION FOR RECONSIDERATION AND THE EMPLOYER'S PETITION FOR RECONSIDERATION BE, AND THEY HEREBY ARE, DENIED ON THE GROUND THAT NOTHING HAS BEEN PRESENTED THAT WAS NOT PREVIOUSLY CONSIDERED BY THE BOARD. BY DIRECTION OF THE BOARD-
-OGDEN W FIELDS NATIONAL LABOR RELATIONS BOARD WASHINGTON DC-

19 Filed July 12, 1956

Exhibit "C"

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

WESTINGHOUSE ELECTRIC CORPORATION, *Employer*

and

BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, *Petitioner*

Type of Election
☐ Consent Agreement
X Board Ordered
☐ Stipulation

Case No. 3-RC-1634

Certification of Representatives

An election having been conducted in the above matter by the undersigned Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board,

IT IS HEREBY CERTIFIED that BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA has been designated and selected by a majority of the employees of the above-named Employer, in the unit herein involved, as their representative for the purposes of collective bargaining, and that, pursuant to Section

9 (a) of the Act as amended, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Buffalo, New York
on the 21st day of June, 1956.

(SEAL)

On behalf of

NATIONAL LABOR RELATIONS BOARD
MERLE D. VINCENT, JR.
Regional Director for Third Region
National Labor Relations Board

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20 Filed September 11, 1956

Motion of Defendants to Dismiss the Complaint or, in the Alternative, for Summary Judgment in Their Favor

Come now the defendants, by their attorneys, and in opposition to plaintiff's motion for a permanent injunction, move as follows:

1. That the complaint herein be dismissed because:

(a) This Court is without jurisdiction of the subject matter of the action;

(b) The complaint fails to state a claim warranting judicial relief.

2. In the alternative, that summary judgment for defendants be granted, on the basis of the complaint, including the exhibits attached thereto, and the copy of the tally of ballots from the official files of the National Labor Relations Board, which is attached hereto as Exhibit 1 and is made a part of this motion.

WHEREFORE, it is respectfully requested that plaintiff's motion for a permanent injunction be denied, and that the relief requested by the defendants be granted.

MARCEL MALLET-PREVOST
/s/ Marcel Mallet-Prevost
Assistant General Counsel

NORTON J. COME,
JOHN E. JAY,
Attorneys,
National Labor Relations Board,
Attorneys for Defendants.
4th & C Streets, S.W.,
Washington 25, D.C.

Dated September 11, 1956.

---

21 Filed September 11, 1956

Exhibit 1

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

WESTINGHOUSE ELECTRIC CORPORATION

and

WESTINGHOUSE ENGINEERS ASSOCIATION, BUFFALO SECTION, ENGINEERS AND SCIENTISTS OF AMERICA

Case No. 3-RC-1634
Date issued June 14, 1956
Type of election Board ordered

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the

election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters	245
2. Void ballots	None
3. Votes cast for Westinghouse Engineers Assn., Buffalo Section	126
4. Votes cast for Buffalo Salaried Employees Assn., Inc.	80
5. Votes cast for	
6. Votes cast against participating labor organization(s)	20
7. Valid votes counted (sum of 3, 4, 5, and 6)	226
8. Challenged ballots	2
9. Valid votes counted plus challenged ballots (sum of 7 and 8)	228
10. Challenges are (*not*) sufficient in number to affect the results of the election.	
11. A majority of the valid votes has been cast for Westinghouse Engineers Association.	

For the Regional Director

EDWARD H. NOONAN, JR.

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For Westinghouse Electric Corporation
DAVID L. TRUMPFHELLER

For Buffalo Salaried Employees Assn., Incorporated
HARRY E. MONHEIM

For Westinghouse Engineers Assn., Buffalo Section, Engineers and Scientists of America
EUGENE P. ROSS

23 Filed September 29, 1956

Cross-Motion of Plaintiff for Summary Judgment in Its Favor.

Comes now the plaintiff, by its attorneys, and in opposition to defendant's motion to dismiss the Complaint or in the alternative for summary judgment in favor of defendants, moves that summary judgment for plaintiff be granted upon the ground that there are no palpable questions of fact involved in this case and that plaintiff is entitled to judgment as a matter of law, in accordance with the correct construction of the controlling provisions of the Labor Management Relations Act of 1947. Plaintiff therefore prays that this Court make an Order granting the relief sought in the Complaint.

Respectfully submitted,

MAYER, WEINER & MAYER
Attorneys for Plaintiff

By: ABRAHAM WEINER
19 West 44th Street
New York 36, N. Y.

JAFFEE & DUNAU
Attorneys for Plaintiff

By: SAMUEL H. JAFFEE
912 DuPont Circle Building, N.W.
Washington 6, D. C.

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25 **Minute Entry of Clerk**

Dec. 3, 1956 Motions (1) To Dismiss "Denied" (2) Motion by pltf. for summary judgt. "Granted"

MATTHEWS, J.

26 Filed Dec. 19, 1956

Findings of Fact and Conclusions of Law

This cause came on to be heard on October 24, 1956, on defendants' motion to dismiss the complaint or, in the alternative, for summary judgment in their favor, and on plaintiff's cross-motion for summary judgment in his favor. The Court, having heard argument, considered the memoranda submitted by the parties and amici,[1] and being fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact

The pleadings and exhibits annexed thereto show, and the parties agree, that no genuine issue as to any material fact exists. Based thereon, the Court finds as follows:

27 1. Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, herein called the Union, is a voluntary unincorporated labor organization, maintaining its principal office for the transaction of its regular business at P. O. Box No. 2528, Cheektowaga, New York. Plaintiff, William Kyne, is its president.

2. Membership in the Union is open to all non-supervisory professional engineers and scientists employed at the Cheektowaga, New York, plant of Westinghouse Electric Corporation. The Union exists for the purpose of enhancing the economic and professional status of engineers and scientists who are professional employees as defined in Section 2 (12) of the Labor Management Relations Act, 1947, (herein called the Act), through collective bargaining with Westinghouse Electric Corporation. Section 2 (12) of the Act provides that:

[1] The National Society of Professional Engineers and the Engineers Joint Council were granted leave to file memoranda in support of the plaintiff's cross-motion for summary judgment.

(12) The term "professional employees" means—

"(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine, mental, manual, or physical processes; or

"(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

3. Westinghouse Electric Corporation is engaged in an industry or activity affecting commerce within the meaning of Sections 2 (6) and 2 (7) of the Act.

28 4. On or about October 14, 1955, plaintiff filed a petition for certification of representatives with the Regional Director of the National Labor Relations Board for the Third Region, alleging that a substantial number of employees, occupying the job descriptions of Engineer Assistant, Engineer Associate, Engineer, Engineer Senior and Engineer Fellow, at the Cheektowaga, New York, plant of Westinghouse Electric Corporation, wish to be represented for purposes of collective bargaining by the Union, and the Union desires to be certified as

the representative of these employees pursuant to Sections 9 (a) and (c) of the Act. The petition was given Case No. 3-RC-1634 by the Regional Director of the National Labor Relations Board for the Third Region.

5. Upon the petition filed by plaintiff, a hearing was conducted on March 7 and 8, 1956, in Buffalo, New York, by an officer duly designated by the Regional Director, pursuant to Section 9 (c) of the Act. At the hearing, by amendment to the petition, the Union sought to represent all professional employees within the meaning of Section 2 (12) of the Act at the Cheektowaga, New York, plant of the Westinghouse Electric Corporation. These included, in addition to the five categories originally named in the petition (listed in paragraph 4 above), the further five categories of Manufacturing Engineer, Manufacturing Engineer Senior, Plant Layout Engineer, Methods Engineer and Purchasing Engineer.

6. At the hearing, Buffalo Salaried Employees Association, Incorporated, a labor organization, was permitted to intervene in the proceedings. The Intervenor alleged that, in addition to the ten categories sought by plaintiff in the amended petition (listed in paragraphs 4 and 5 above), the further categories of Engineer Order Service, Engineer Test Record, Engineer Contact, Order Correspondent Master, and Safety Inspector were also comprised of professional employees within the meaning of Section 2 (12) of the Act and should be included
29 within the bargaining unit together with all the professional employees covered by the amended petition.

7. On May 28, 1956, the National Labor Relations Board, whose Chairman and Members comprise the defendants herein, issued its Decision and Direction of Election in the representation proceeding, reported at 115 NLRB No. 228. The Board found that the ten categories sought to be included in the bargaining unit by plaintiff com-

prise professional employees within the meaning of Section 2 (12) of the Act. It further found that the additional categories sought by the Intervenor—Engineer Order Service, Engineer Test Record, Engineer Contact, Order Correspondent Master, and Safety Inspector—do not comprise professional employees within the meaning of Section 2 (12) of the Act. The Board further concluded that the non-professional employees occupying the 3 job classifications of Engineer Order Service, Engineer Test Record and Engineer Contact, shared a "close community of employment interests" with the professional engineers, in that these employees "have had considerable education and experience in the engineering field, are occasionally transferred to the professional engineering categories, work in the same general area and under common supervision with the admittedly professional engineering employees, spend much of their time collaborating and consulting with these professional employees," and were "included with the admittedly professional engineers in the voting group in the 1946 election" conducted by the Board. Under these circumstances, and, as "the addition of the 9 employees in these categories to the unit of 233 employees stipulated to be professional would [not] destroy the predominantly professional character" of the unit proposed for the professional employees, the Board included the 3 non-professional job classifications in the professional unit. Accordingly, the Board determined the appropriate unit to be, as follows:

> All professional employees, including the categories of engineer assistant, engineer associate, engineer, engineer senior, engineer fellow, manufacturing engineer, manufacturing engineer senior, plant layout engineer, methods engineer (formerly time and motion analyst), purchasing engineer, engineer order service, engineer test record, and engineer contact, but excluding the categories of machine designer, order corre-

spondent master, and safety inspector, all other employees, guards, and supervisors as defined in the Act.

Thus the Board found that all professional employees at the Cheektowaga, New York, plant of Westinghouse Electric Corporation, including the ten named categories sought by plaintiff, *plus* three categories of non-professional employees—Engineer Order Service, Engineer Test Record, and Engineer Contact—constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. The Board directed that, not later than thirty days from the date of its Direction, an election be conducted among the employees in this unit to determine whether or not they desire to be represented, for purposes of collective bargaining, by the Union, by the Intervenor, or by neither. The Board refused to direct a vote among the professional employees as such to decide whether or not they wished to be included in a unit together with the non-professional employees.

8. On June 7, 1956, plaintiff filed with the National Labor Relations Board a Motion to Stay Election, Reconsider And Amend Decision And Direction Of Election, And Request For Oral Argument. Plaintiff alleged that the Board acted in excess of its statutory authority by including, in the same bargaining unit, professional and non-professional employees without having first accorded such professional employees an opportunity to determine by majority vote whether or not they wished to be included in such unit, as required by Section 9 (b) (1) of the Act. Section 9 (b) (1) provides that:

31 "... the Board shall not (1) decide that any unit is appropriate for such [collective bargaining] purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit. ..."

On June 13, 1956, the Board denied this motion.

9. On June 14, 1956, an election by secret ballot was held under the direction of the Regional Director of the National Labor Relations Board for the Third Region among the employees in the unit found appropriate by the Board, including the non-professional employees, without the professional employees having been first accorded an opportunity to determine by vote whether or not they wished to be included in such unit. Of the 226 valid votes cast, 126 valid votes were cast for the Union, it thereby receiving a majority of the valid votes cast. On June 21, 1956, the Union was certified by the Regional Director of the National Labor Relations Board for the Third Region, acting on behalf of the National Labor Relations Board, as the exclusive bargaining representative of the professional and non-professional employees at the Cheektowaga, New York, plant of the Westinghouse Electric Corporation, in the unit that the Board had found appropriate.

10. On July 12, 1956, plaintiff filed his complaint in this Court. Plaintiff alleged that defendants, Chairman and Members of and constituting the National Labor Relations Board, exceeded the scope of their statutory authority in refusing to direct a vote among the professional employees as such to determine whether they wish to be included in the unit with nonprofessional employees; and that the consequence of that refusal is irreparably to deny and destroy the statutory right to have a unit include only professional employees unless a majority of the professional employees vote for the inclusion of non-professional employees. Plaintiff prayed for a permanent injunction requiring defendants to set aside the Decision and Direction of Election, to the extent that it failed to provide
32 for an election among the professional employees to determine whether or not a majority of them desired to be included within a unit with non-professional employees; to set aside the election conducted on June 14, 1956; to set aside the certification of representatives dated

June 21, 1956; and enjoining the defendants from processing the petition unless it conducted its investigation to ascertain representatives for purposes of collective bargaining as required by Section 9 (b) (1) of the Act.

Conclusions of Law

1. This Court has jurisdiction to entertain the merits of the complaint inasmuch as the question presented for determination is whether or not defendants exceeded the scope of their statutory authority under the terms of Section 9 (b) (1) of the Labor Management Relations Act, 1947. *Farmer* v. *United Electrical Workers*, 211 F. 2d 36, 40 (C.A.D.C.), cert. denied, 347 U.S. 943; *DePratter* v. *Farmer*, 232 F. 2d 74, 75 (C.A.D.C.).

2. The defendants found that professional and non-professional employees together comprise a unit appropriate for purposes of collective bargaining without first conducting a separate election among the professional employees to determine whether a majority of them favor inclusion within a unit with non-professional employees. Section 9 (b) (1) of the Act states explicitly that "the Board *shall not* (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit. . ." (emphasis added). The Board has no statutory warrant to disregard this mandatory limitation upon its authority because in its view the commingling of professional and non-professional employees would not "destroy the predominantly professional character of such a unit," without conducting the requisite election in which a majority of such professional employees vote for inclusion in such unit. The refusal of de-
33 fendants to conduct the required election works irreparable harm to the statutory right that an appropriate unit for collective bargaining purposes shall include only professional employees unless a majority of them

vote for the inclusion of non-professional employees within the unit.

3. Accordingly, defendants' motion to dismiss the complaint or, in the alternative, for summary judgment is denied; the plaintiff's motion for summary judgment is granted; and an appropriate order in conformity herewith will be entered.

BURNITA SHELTON MATTHEWS
Judge

Dated: December 19, 1956

No objection as to form:

MARCEL MALLET-PREVOST
Attorney for Defendants,

December 18, 1956.

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34 Filed December 19, 1956

Order

This cause having been heard on October 24, 1956, on defendants' motion to dismiss the complaint or, in the alternative, for summary judgment in their favor, and on plaintiff's cross-motion for summary judgment in his favor; and the Court, having heard argument, considered the memoranda submitted, and, being fully advised in the premises, having made its findings of fact and conclusions of law; now, therefore, on this 19th day of December, 1956, the Court orders, adjudges and decrees that:

1. Defendants' motion to dismiss the complaint or, in the alternative, for summary judgment in their favor is denied.

2. Plaintiff's motion for summary judgment is granted.

3. Defendants, their officers, agents, servants, employees and attorneys, and all persons in active concert or partici-

pation with them who receive actual notice of this order, shall: (a) set aside and vacate the Decision and Direction of Election in Case No. 3-RC-1634, dated May 28, 1956, to the extent that it determines that a unit for collective bargaining purposes may include both professional and non-professional employees in the same unit without affording the professional employees an opportunity to vote on whether or not they desire to be included in the same unit with non-professional employees; (b) set aside and vacate the election conducted on June 14, 1956, in Case No. 3-RC-1634; (c) set aside and vacate the certification of representatives issued on June 21, 1956, in Case No. 3-RC-1634; and (d) further process the petition filed in Case No. 3-RC-1634 in accordance with customary procedures, provided that a unit including both the professional employees in that case and non-professional employees shall not be found appropriate for purposes of collective bargaining, unless the professional employees are afforded an opportunity to vote on whether or not they desire to be included in the same unit with non-professional employees.

4. The execution of paragraph 3 of this Order shall be stayed pending disposition of defendants' appeal from the Order.

BURNITA SHELTON MATTHEWS
Judge

No objection as to form:

MARCEL MALLET-PREVOST
Attorney for Defendants

December 18, 1956.

36 Filed December 19, 1956

Motion of Defendants to Drop Ivar H. Peterson as a Party Defendant

Come now the defendants, by their attorneys, and move the Court for an order dropping Ivar H. Peterson as a party defendant to this action. In support of this motion, defendants show as follows:

1. On August 27, 1956, during the pendency of this action, the term of Ivar H. Peterson as a member of the National Labor Relations Board expired in accordance with the provisions of Section 3(a) of the National Labor Relations Act, as amended.

2. No successor has as yet been appointed to the vacancy created by the expiration of Member Peterson's term.

3. The four remaining parties defendant are thus, at present, the sole members of the National Labor Relations Board vested with the powers under the Act to grant the affirmative relief prayed for by plaintiff in the complaint.

37 WHEREFORE, it is respectfully requested that defendants' motion to drop Ivar H. Peterson as party defendant be granted.

Dated December 18, 1956.

MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel

Consented to this 18 day of December, 1956.

BERNARD NUMAN
Counsel for Plaintiff

38 Filed December 19, 1956

Order Dropping Ivar H. Peterson as a Party Defendant

Pursuant to defendants' motion, which has been consented to by plaintiff, the Court orders, adjudges and decrees that:

IVAR H. PETERSON is hereby dropped as a party defendant to this action.

Dated this 19th day of December, 1956.

BURNITA SHELTON MATTHEWS
United States District Judge

---

39 Filed December 27, 1956

Notice of Appeal

Notice is hereby given that Boyd S. Leedom, Abe Murdock, Philip Ray Rodgers, and Stephen S. Bean, defendants herein, hereby appeal to the Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on December 19, 1956.

MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel

NATIONAL LABOR RELATIONS BOARD
Attorney for Defendants

December 26, 1956.

40 Filed December 27, 1956

Designation of Contents of Record on Appeal

The Defendants herein hereby designate, as the record on appeal to the Court of Appeals for the District of Columbia Circuit, the entire record of the proceedings before the District Court in this action including the following:

1. The complaint for injunction, dated July 10, 1956.

2. Motion of defendants to dismiss the complaint or, in the alternative, for summary judgment, dated September 11, 1956.

3. Cross-motion of plaintiff for summary judgment, served on September 29, 1956.

4. Minute entry of District Court denying defendants' motion and granting plaintiff's cross-motion.

5. Findings of Fact and Conclusions of Law, entered by the District Court on December 19, 1956.

6. Order entered by the District Court on December 19, 1956, granting judgment for plaintiff.

7. Defendants' motion to drop Ivar H. Peterson as a party defendant, and the order of the District Court granting such motion.

41 8. Notice of Appeal.

9. This designation.

MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel

NATIONAL LABOR RELATIONS BOARD
Attorney for Defendants

December 26, 1956.

36 [File endorsement omitted.]

In United States Court of Appeals for the District of Columbia Circuit

No. 13701

BOYD S. LEEDOM, et al., individually and as Chairman and Members of and Constituting the NATIONAL LABOR RELATIONS BOARD, APPELLANTS

v.

WILLIAM KYNE, individually and as President of Buffalo Section, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS and SCIENTISTS of AMERICA, a voluntary unincorporated Labor Organization, APPELLEE

Appeal from the United States District Court for the District of Columbia

Mr. Norton J. Come, Attorney, National Labor Relations Board, with whom *Messrs. Charles Stephen Leonard*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for appellants.

Mr. Jonas Silver, with whom *Mr. Bernard Dunau* was on the brief, for appellee. *Mr. Samuel H. Jaffee* also entered an appearance for appellee.

Mr. Milton F. Lunch filed a brief on behalf of National Society of Professional Engineers, as *amicus curiae*, urging affirmance.

37 *Messrs. Gerard D. Reilly* and *Joseph C. Wells* filed a brief on behalf of Engineers Joint Council, as *amicus curiae*, urging affirmance.

Opinion

September 16, 1957

Before BAZELON, BASTIAN and BURGER, Circuit Judges.

BAZELON, *Circuit Judge:* Appellee, President of the Westinghouse Engineers Association,[1] brought this suit against appel-

[1] The full name of this organization is Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America.

lant members of the National Labor Relations Board to set aside a certification under § 9 of the National Labor Relations Act. The unit certified consisted of 233 admittedly professional employees, within the meaning of § 2 (12) of the Act, whom the Engineers Association had sought to represent; and 9 others, admittedly non-professional, whom the Board included, over objection of the Engineers Association, because they share a "close community of employment interest" with the professionals and their inclusion would not "destroy the predominantly professional character" of the unit. The District Court, however, agreed with the Engineers Association that inclusion of these non-professionals violated § 9 (b) which provides, in pertinent part, "that the Board shall not (1) decide that any unit is appropriate for [purposes of collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." Accordingly, on cross motions, the court granted summary judgment in favor of appellee and against appellants.

On this appeal, as in the court below, the Board takes the familiar position that, under § 9 (d), its determinations in representation proceedings are reviewable only in the courts of appeals and only when they have become the
38 basis for a "final order" in an unfair labor practice proceeding under § 10. It relies heavily on *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943).

"Before we can decide whether these proceedings are reviewable in an original equity suit in the District Court, there must be a showing 'of unlawful action by the Board and resulting injury . . . by way of departure from statutory requirements or from those of due process.' *Inland Empire District Council, etc.* v. *Millis*, 1945, 325 U. S. 697, 700, 65 S. Ct. 1316, 89 L. Ed. 1877." *DePratter* v. *Farmer*, 98 U. S. App. D. C. 74, 76, 232 F. 2d 74, 76 (1956). Equitable relief is clearly barred in the wide area of determinations which depend on the Board's expertise and discretion; as for example, in *Switchmen's Union*, that railroad yardmen should be included in a unit with certain other smaller groups of railroad employees, or, in *DePratter*, that full time production employees should be included in a unit with employees who devote only part time to production and the rest to other tasks.

This case, however, presents "a different 'type of problem.'"[2] Section 9 (b) (1) expressly forbids inclusion of professionals and non-professionals in the same bargaining unit "*unless* a majority of [the] professional employees vote for inclusion in such unit." It is clear that this provision was intended to protect the professionals; that the professionals' right to this benefit does not depend on Board discretion or expertise; and that denial of this right must be deemed to result in injury. Thus this case presents Board violation of a statutory requirement and resulting injury.

39 Whether, granting the availability of a § 10 remedy, the injury flowing from the violation of § 9 (b) (1) would support equitable relief need not be decided. Here review by way of § 10 is too remote and conjectural to be viewed as providing an adequate remedy. *Farmers* v. *United Electrical, Radio & Machine Workers*, 93 U. S. App. D. C. 178, 211 F. 2d 36 (1953). Since the employer is not aggrieved by the Board's inclusion of the nine non-professionals, he cannot be relied upon to refuse to bargain and thus make it possible for the Association to bring a reviewable § 10 proceeding. Nor is it likely that an Engineers Association refusal to bargain for the nine non-professionals would induce the employer to seek review since he would then be free to deal with all employees individually. Nor could we expect such refusal to induce any of the nine non-professionals to seek review. They are hardly likely to insist upon placing their fate in the hands of a reluctant bargaining representative.

Affirmed.

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[2] *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 89 U. S. App. D. C. 24, 27, 189 F. 2d 685, 688 (1951); see also *Farmer* v. *United Electrical, Radio & Machine Workers*, 93 U. S. App. D. C. 178, 211 F. 2d 36 (1953), *cert. denied*, 347 U. S. 943 (1954); *Leedom* v. *International Union*, 352 U. S. 145 (1956).

40 [File endorsement omitted.]

In United States Court of Appeals for the District of Columbia Circuit

No. 13,701

C. A. 2909–56

BOYD S. LEEDOM, et al., individually and as Chairman and Members of and Constituting the NATIONAL LABOR RELATIONS BOARD, APPELLANTS

v.

WILLIAM KYNE, individually and as President of Buffalo Section, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS and SCIENTISTS of AMERICA, a voluntary unincorporated Labor Organization, APPELLEE

Appeal from the United States District Court for the District of Columbia

Before BAZELON, BASTIAN and BURGER, Circuit Judges.

Judgment

September 16, 1957

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per *Circuit Judge* BAZELON.

42 [Clerk's Certificate to foregoing transcript omitted in printing]

43 Supreme Court of the United States

No. 633, October Term, 1957.

BOYD S. LEEDOM, et al., individually and as Chairman and Members of and Constituting the NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

WILLIAM KYNE, individually and as President of Buffalo Section, WESTINGHOUSE ENGINEERS ASSOCIATION, etc.

Order allowing certiorari

January 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1958

Office - Supreme Court, U.S.
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DEC 2 1957
JOHN T. FEY, Clerk

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SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1957

BOYD S. LEEDOM, ET AL., INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

WILLIAM KYNE, INDIVIDUALLY AND AS PRESIDENT OF BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, A VOLUNTARY UNINCORPORATED LABOR ORGANIZATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

JEROME D. FENTON,
General Counsel,
STEPHEN LEONARD,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
NORTON J. COMEN,
Attorney,
National Labor Relations Board, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
A. The Board representation proceeding giving rise to this suit	2
B. The instant suit	7
Reasons for granting the writ	10
Conclusion	16
Appendix A	17
Appendix B	22

CITATIONS

Cases:

American Federation of Labor v. *National Labor Relations Board*, 308 U. S. 401 ..... 10, 11, 14

Boeing Airplane Co., 86 N. L. R. B. 368 6

Continental Motor Corp., 77 N. L. R. B. 345 5

Farmer v. *United Electrical Workers*, 211 F. 2d 36, certiorari denied, 347 U. S. 943 ..... 11, 12

Fay v. *Douds*, 78 F. Supp. 703, affirmed, 172 F. 2d 720 ..... 13, 16

Federal Telecommunications Lab., Inc., 92 N. L. R. B. 1395 6

Fitzgerald v. *Douds*, 167 F. 2d 714 13

Housewright v. *Hull*, 104 F. Supp. 234 13

Inland Empire District Council v. *Millis*, 325 U. S. 697 ..... 10, 12

International Union of Operating Engineers, Local No. 148 v. *International Union of Operating Engineers, Local No. 2*, 173 F. 2d 557 ..... 13, 16

Madden v. *Brotherhood*, 147 F. 2d 439 ..... 13, 14

May Department Stores Co. v. *National Labor Relations Board*, 326 U. S. 376 9

M. E. S. A. v. *Schauffler*, 103 F. Supp. 130 13

Miller Electric Co., 101 N. L. R. B. 1014 6

Cases—Continued Page

Pacific Gas & Electric Co., 98 N. L. R. B. No. 130 ... 5
Potomac Electric Power Company, 99 N. L. R. B. 219 ... 6
Schwarz Laboratories, Inc., 89 N. L. R. B. 930 ... 6
Squibb & Sons, 83 N. L. R. B. 792 ... 6
Standard Oil Co., 107 N. L. R. B. 1524 ... 5
Switchmen's Union v. *National Mediation Board*, 320 U. S. 297 ... 13, 14
Westinghouse Electric Corp., 89 N. L. R. B. 8 ... 6
Westinghouse Electric Corp., 80 N. L. R. B. 591 ... 6
White v. *Herzog*, 80 F. Supp. 407 ... 16

Statutes:

Administrative Procedure Act, 5 U. S. C. 1001, *et seq.*:
Section 10 ... 8, 16, 25
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*):
Section 2 (12) ... 3, 4, 22
Section 8 (b) (3) ... 9
Section 9 ... 3
Section 9 (b) ... 22
Section 9 (b) (1) ... 5, 6, 8, 9, 11, 22
Section 9 (c) ... 2
Section 9 (d) ... 9, 12, 14, 15, 23
Section 9 (h) ... 12
Section 10 (e) ... 9, 10, 12, 13, 23
Section 10 (f) ... 9, 10, 12, 13, 14, 23
28 U. S. C. 1337 (formerly Section 24 of the Judicial Code) ... 8, 10, 25

Miscellaneous:

Annual Reports of the National Labor Relations Board:
Thirteenth Annual Report, p. 40, n. 19 ... 6
Fourteenth Annual Report, p. 38 ... 6
Twenty-first Annual Report, pp. 163, 169 ... 12
Attorney General's Manual on the Administrative Procedure Act (U. S. Dept. of Justice, 1947) pp. 94–95 ... 16
1 Leg. Hist. of the Labor Management Relations Act, 1947 (G. P. O., 1948):
p. 417 ... 6
pp. 61–62, 327–328, 540 ... 6

Miscellaneous—Continued

	Page
2 Leg. Hist. of the Labor Management Relations Act, 1947, p. 1077	6
93 Cong. Rec. 6444, 2 Leg. Hist., 1947, p. 1542	15
Hearings before the Joint Committee on Labor Management Relations, 80th Cong., 2d Sess., pp. 1147–1148	6
Hearings before the Senate Committee on Education and Labor on S. 1000, *et al.*, 76th Cong., 1st Sess., pp. 460–463, 584–585	14
Hearings before the Senate Committee on Labor and Public Welfare on S. 55, *et al.*, 80th Cong., 1st Sess., pp. 1702–1712	6
H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 56–57, 1 Leg. Hist., 1947, pp. 560–561	15
H. Min. Rep. No. 245, 80th Cong., 1st Sess., p. 94, 1 Leg. Hist., 1947, p. 385	15
H. Rep. No. 245, 80th Cong., 1st Sess., pp. 43, 59–60, 1 Leg. Hist., 1947, pp. 334, 350–351	14
H. Rep. No. 1147, 74th Cong., 1st Sess., p. 7, 2 Leg. Hist. of the National Labor Relations Act, 1935 (G. P. O., 1935), p. 3053	14
S. Rep. No. 573, 74th Cong., 1st Sess., pp. 5–6, 2 Leg. Hist., 1935, p. 2305	14

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. ——

BOYD S. LEEDOM, ET AL., INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

WILLIAM KYNE, INDIVIDUALLY AND AS PRESIDENT OF BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, A VOLUNTARY UNINCORPORATED LABOR ORGANIZATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, issued September 16, 1957, affirming an order of the district court setting aside a Board certification issued to respondent's union.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. 17–20) is not yet reported. The findings, conclu-

sions and order of the district court, also unreported, are set forth at R. 24–32.

JURISDICTION

The judgment of the court below (Appendix A, *infra*, pp. 20–21) was entered on September 16, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a federal district court has jurisdiction to set aside a certification, issued by the National Labor Relations Board under Section 9 (c) of the National Labor Relations Act, as amended, upon allegations by the labor organization receiving the certification that the Board failed to comply with an explicit statutory requirement in establishing the bargaining unit covered by the certification.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) and of other relevant statutes are set forth in Appendix B, pp. 22–26, *infra*.

STATEMENT

A. The Board representation proceeding giving rise to this suit

On October 15, 1955, respondent, the president of the Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America (hereinafter called the Engineers Association), filed with a

Regional Director of the Board a representation petition under Section 9 of the Act (R. 3–4, 11, 25–26).[1] This petition sought an election for the purpose of certifying the Engineers Association as the exclusive bargaining agent for a unit of about 166 engineering employees in 5 job classifications, working at the Cheektowaga, New York, plant of the Westinghouse Electric Corporation. The 5 classifications were engineer, engineer associate, engineer assistant, engineer senior and engineer fellow (R. 3, 12–13, 25–26). At the hearing, held on March 7 and 8, 1956, before a Board hearing officer, the Engineers Association moved to amend the unit specified in its petition so as to include 5 additional groups of engineers working at the plant, totaling about 67 employees (R. 4, 13, 26).

The Buffalo Salaried Employees Association (hereinafter called the Salaried Employees), which had been permitted to intervene,[2] agreed that the approximately 233 employees whom the Engineers Association sought to represent were professional employees within the meaning of Section 2 (12) of the Act, set forth at p. 22, *infra* (R. 4, 11, 13, 26). It contended, however, that 5 other categories of employees, 14 in number, were similarly professional employees who should also be included in the professional unit. These 5 other categories were engineer order service,

[1] "R" references are to the Joint Appendix filed in the court below.

[2] The Salaried Employees had been certified by the Board in 1946 as the representative for a combined unit consisting of two groups of professional employees and one group of salaried nonprofessional employees (R. 13, n. 5).

engineer test record, engineer contact, order correspondent master, and safety inspector (R. 4, 13, 26). The Engineers Association opposed the inclusion of these other categories in the unit on the ground that they were not professional employees (R. 13).

The Board, on the basis of the record adduced at the hearing, issued its decision on May 28, 1956, directing the holding of a representation election (R. 4–5, 11–18, 26–28). The Board held, as the parties had stipulated, that the 166 employees named by the Engineers Association in its petition, as well as the 67 other engineering employees it later sought to include in the proposed unit, were all professional employees within the meaning of Section 2 (12) of the Act (R. 4; 13, 26–27). The Board further held that none of the 5 categories of employees, 14 in number, whom the incumbent Salaried Employees Association sought to include, were professional employees within Section 2 (12) (R. 4–5, 14–16, 27). However, the Board concluded that the nonprofessional employees occupying the 3 job classifications of engineer order service, engineer test record and engineer contact shared a "close community of employment interest" with the professional engineers;[3] and that, since they consti-

[3] In this connection, the Board noted that these employees had considerable engineering education and engineering experience, were occasionally transferred to the professional engineering categories, worked in the same general area and under common supervision with the professional engineers, collaborated and consulted with the professional engineers, and voted with the professional engineers in the 1946 election (n. 2, *supra;* R. 13–15, 16). On the other hand, in excluding the other employees urged by the Salaried Employees, who were order correspondent masters or safety inspectors, the Board

tuted only 9 employees, their inclusion with the 233 professional employees would not "destroy the predominantly professional character" of the unit proposed for the professional engineer employees (R. 5, 14–16, 27).

In so deciding, the Board concluded that the provisions of Section 9 (b) (1) of the Act[4] did not require it to afford the approximately 233 professional employees a separate self-determination election to determine whether they desired to have the 9 nonprofessional employees included in the same collective bargaining unit. As shown by the cases cited in its decision (R. 16, n. 7), it has consistently been the Board's view that this section was designed to apply only where the professional employees constitute the minority group in a proposed unit, so that a separate self-determination election would be necessary to afford them an effective voice in selecting the bargaining representative.[5] The Board's position is that

noted that they did not share this mutuality of employment interests, and were not included with the engineers in the 1946 election (R. 15–16).

[4] Insofar as relevant here, Section 9 (b) (1) provides:

> *Provided*, That the Board shall not (1) decide that any unit is appropriate for [purposes of collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; * * *

[5] The original Board decision on this point occurred shortly after Section 9 (b) (1) was added to the Act. *Continental Motors Corp.*, 77 N. L. R. B. 345, 347–348. This decision has been uniformly followed since that time. *Standard Oil Co.*, 107 N. L. R. B. 1524, 1525–1527; *Pacific Gas & Electric Co.*, 98 N. L. R. B. No. 130; *Miller Electric Co.*, 101 N. L. R. B.

Congress did not intend the provisions of this section to empower professional employees to limit the scope of a unit where they constituted a clear majority, as in the instant case, thereby depriving other employees with a close community of employment interests of the most suitable means of exercising their collective bargaining rights.[6]

Accordingly, the Board directed an election in the combined unit of the 233 professional employees and

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1014, 1016; *Potomac Electric Power Company*, 99 N. L. R. B. 219; *Federal Telecommunications Lab., Inc.*, 92 N. L. R. B. 1395, 1396–1399; *Schwarz Laboratories, Inc.*, 89 N. L. R. B. 930, 931–932; *Westinghouse Electric Corp.*, 89 N. L. R. B. 8, 29, 34; *Boeing Airplane Co.*, 86 N. L. R. B. 368, 371; *Squibb & Sons*, 83 N. L. R. B. 792; *Westinghouse Electric Corp.*, 80 N. L. R. B. 591, 594–595. In 1948, Congress was apprised of the Board's construction of Section 9 (b) (1) of the Act, by Chairman Paul M. Herzog. See Hearings before the Joint Committee on Labor-Management Relations, 80th Cong., 2d Sess., pp. 1147–1148. Congress was also apprised of this construction in 1949 and 1950. Thirteenth Annual Report of the National Labor Relations Board, p. 40, n. 19; Fourteenth Annual Report of the National Labor Relations Board, p. 38.

[6] Thus, the Senate Report, explaining the objective of the provision which became Section 9 (b) (1), states that it was aimed at the Board's past practice of "covering professional personnel into general units of production and maintenance employees or general units of office and clerical employees," a practice which tended to obscure the special interests of the professionals since "their number is always small in comparison with production or clerical employees" (1 Leg. Hist. of the Labor Management Relations Act, 1947 (G. P. O., 1948), p. 417). See also, 1 Leg. Hist., 1947, pp. 62, 327–328, 540; 2 Leg. Hist., 1947, pp. 61–1077; Hearings before the Senate Committee on Labor and Public Welfare on S. 55, *et al.*, 80th Cong., 1st Sess., pp. 1702–1712.

the 9 closely allied nonprofessional employees. The unit was described as follows (R. 5, 17–18; 27–28):

> All professional employees, including the categories of engineer assistant, engineer associate, engineer, engineer senior, engineer fellow, manufacturing engineer, manufacturing engineer senior, plant layout engineer, methods engineer (formerly time and motion analyst), purchasing engineer, engineer order service, engineer test record, and engineer contact, but excluding the categories of machine designer, order correspondent master, and safety inspector, all other employees, guards, and supervisors as defined in the Act.

The employees were afforded the choice of selecting the Engineers Association, the Salaried Employees Association, or neither, as their bargaining representative (R. 5, 17–18, 28).

On June 14, 1956, an election by secret ballot was conducted among the employees in this unit (R. 6, 19, 29). In the election, a majority of the employees designated the Engineers Association as their collective bargaining representative; the Engineers Association received 126 of the 228 votes cast (R. 6, 21–22, 29). Thereafter, on June 21, 1956, the Engineers Association was certified as the exclusive bargaining agent of the unit described in the Board's direction of election (R. 6, 19–20, 29).

B. The instant suit

On July 12, 1956, respondent, president of the union certified by the Board, instituted this suit in the district court for the purpose of having the certifi-

cation reviewed and set aside. The jurisdiction of the court was sought to be predicated on 28 U. S. C. 1337 and Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009 (R. 2). The gravamen of the complaint was that the Board "exceeded the scope of [its] statutory authority" and "failed and refused to comply with Section 9 (b) (1) of [the] Act" (R. 7–8), by determining that a unit composed of 233 professional employees and 9 nonprofessional employees was appropriate for the purpose of collective bargaining, without first affording the professional engineering employees a separate election to determine whether or not they desired to be included with the nonprofessional employees.

The Board moved to dismiss the complaint or, in the alternative, for summary judgment in its favor, on the grounds that the district court was without jurisdiction of the subject matter and that the complaint failed to state a claim warranting judicial relief. Respondent thereafter filed a cross-motion for summary judgment in his favor (R. 20–21, 23).

On December 3, 1956, the district court denied the Board's motion and granted respondent's motion for summary judgment (R. 23). The court held that it had jurisdiction to review the Board's representation determination, that Section 9 (b) (1) of the Act was applicable, and that the Board exceeded its statutory authority in failing to afford the professional employees a separate self-determination election (R. 30). The court entered an order (R. 31–32) which directs the Board to set aside and vacate the prior election and certification, and to further process the repre-

sentation petition filed by the Engineers Association. At the same time, the order restrains the Board from finding a unit including both professional employees and non-professional employees to be appropriate for purposes of collective bargaining without first affording the professional employees a self-determination election.

The Board appealed to the court below. Without contesting the district court's interpretation of Section 9 (b) (1), the Board contended that Congress intended to preclude review of Board representation determinations except to the limited extent provided in Sections 9 (d) and 10 (e) and (f) of the Act, *i. e.*, where the determination had become the basis for an unfair labor practice order and that order was before the Court of Appeals for review or enforcement. On September 16, 1957, the court below affirmed the decision of the district court, holding that "review by way of § 10 is too remote and conjectural to be viewed as providing an adequate remedy" in this case (*infra*, pp. 19–20).[7] It went on to conclude that the repre-

[7] The Board had contended that the union conceivably could have obtained review of the certification under the statutory review procedure. That is, the union could have refused to bargain with the Company except for a unit of only professional employees, thereby subjecting itself to a charge that it had violated Section 8 (b) (3) of the Act. Were the Board then to issue an order requiring the union to bargain in the unit covered by the certification, the union could obtain review of that order and the underlying certification under Sections 9 (d) and 10 (e) or (f) for, when such an order is brought to the Court of Appeals upon a petition for review or enforcement, the validity of the representation determination itself is open to full judicial review. *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376.

sentation determination could be reviewed by an original equity suit in the federal district court, since the issue presented was not "in the wide area of determinations which depend on the Board's expertise and discretion," but entailed "Board violation of a statutory requirement and resulting injury" (*infra*, pp. 18–19).

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that a Board representation determination may be reviewed by an independent equity suit in the federal district court, where no other feasible method of review is available and the determination involves "Board violation of a statutory requirement," presents a substantial and important question which has twice been reserved by this Court. In *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, the Court concluded that a Board certification was not a "final order" and thus not directly reviewable in the Court of Appeals under Section 10 (e) or (f) of the Act. It noted, however, that it was not deciding whether the certification could be reviewed by an original suit in the district court under § 24 of the Judicial Code (now 28 U. S. C. 1337), as this question could be "appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy" (*id.*, at 412). The question was again presented, more directly, in *Inland Empire District Council* v. *Millis*, 325 U. S. 697, where a certification was sought to be reviewed by an action instituted in the

district court. Concluding that no showing had been made that the Board had departed "from statutory requirements or from those of due process of law," the Court sustained the dismissal of the complaint without reaching the question whether the district court had jurisdiction to review a Board certification. The Court, repeating the earlier view expressed in the *American Federation of Labor* case, *supra*, stated that it would be inappropriate to decide the jurisdictional question in the absence of "some showing that the Board has acted unlawfully" (*id.* at 700).

The instant case satisfies this requirement, since the court below accepted the district court's conclusion that the Board action was contrary to Section 9 (b) (1) of the Act, and further found that the review provisions of the Act itself afforded respondent no adequate method of obtaining review of the certification. Accordingly, the jurisdictional issue previously deferred by this Court is ripe for adjudication here.*

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*The Board's petition for certiorari in *Farmer* v. *United Electrical Workers*, No. 597, October Term, 1953, which was denied by the Court (347 U. S. 943), presented the jurisdictional question, but not, as here, in the context of a typical representation case. Thus, in *United Electrical*, certain unions, in danger of losing their compliance status under Section 9 (h) of the Act, as a result of a Board administrative investigation into the veracity of the non-Communist affidavits filed by some of their officers, brought suit in a federal district court to enjoin the Board inquiry on the ground that it was beyond the Board's powers. The district court agreed with the union's contention and issued an injunction, which was sustained by the Court of Appeals (211 F. 2d 36). The Board then petitioned for certiorari raising two questions: (1) whether the Board had power to investigate the veracity of affidavits filed

2. The question presented here, as the Court recognized in its *Inland Empire* opinion, is of "obvious importance" in the administration of the Act (325 U. S. 699).[9] Moreover, the holding of the court below is in direct conflict with the decisions of other courts of appeals.

Thus, both the Second and the Fourth Circuits have concluded that the scheme of the Act and its legislative history (discussed *infra*, pp. 14–15) show that Congress intended to preclude review of Board representation determinations except to the extent provided in Section 9 (d) of the Act, *i. e.*, when the determination has become the basis for an unfair labor practice order and that order is before the Court of Appeals for review or enforcement under Section 10 (e) or (f). Hence, they have concluded

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pursuant to Section 9 (h); and (2) whether the district court, in any event, had jurisdiction to review the Board's administrative action (Petition in No. 597, October Term, 1953, p. 2).

In these circumstances, we submit that the denial of certiorari in *United Electrical* clearly does not affect the propriety of the instant petition. For, since *United Electrical* did not involve review of a particular Board representation determination, but rather action which the Court of Appeals described as wholly "preliminary" to any unfair labor practice case or representation proceeding (211 F. 2d at 40), the considerations which, as we show, pp. 14–15, *infra*, led Congress to preclude direct review of a Board representation determination were not necessarily applicable to the situation there presented.

[9] Representation cases are by far the biggest proportion of the Board's total caseload (see Twenty-first Annual Report of the National Labor Relations Board, pp. 163, 169), and the decision of the courts below greatly enlarges, and indeed removes any practical limitation on the number of such cases which could be subjected to direct review in the district courts (see pp. 15–16, *infra*).

that the Act, like the Railway Labor Act with respect to the analogous representation determinations of the National Mediation Board (see *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297), deprives the district courts of jurisdiction to review Board representation determinations. In short, contrary to the court below, the Second and Fourth Circuits have held that a Board representation determination may not be reviewed in a federal district court, not only where the exercise of Board discretion is at issue, but also where questions of the Board's legal power are involved. *Fitzgerald* v. *Douds*, 167 F. 2d 714, 716–717 (C. A. 2); *Madden* v. *Brotherhood*, 147 F. 2d 439, 442–445 (C. A. 4).[10] See also, *International Union of Operating Engineers, Local No. 148* v. *International Union of Operating Engineers, Local No. 2*, 173 F. 2d 557, 559 (C. A. 8); *Housewright* v. *Hull*, 104 F. Supp. 234 (N. D. Ohio); *M. E. S. A.* v. *Schauffler*, 103 F. Supp. 130 (E. D. Pa.).

In view of the importance of the question, this conflict in decisions requires resolution by this Court.

3. The holding of the court below is erroneous. As previously noted, the Act, although providing for judicial review of Board orders (Section 10 (e) and (f)), provides for review of a representation determination only in the circumstance specified in Section

[10] The only exception recognized under these holdings is where the Board representation determination presents a substantial constitutional question. *Fay* v. *Douds*, 172 F. 2d 720, 723 (C. A. 2). This is because, as pointed out in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301, "constitutional questions aside, it is for Congress to determine how the rights it creates shall be enforced."

9 (d) (*supra*, p. 12). "In such a case the specification of one remedy normally excludes another." *Switchmen's Union* v. *National Mediation Board*, 320 U. S. at 301. Moreover, the legislative history of both the original and amended Acts discloses that Congress extensively considered and specifically rejected proposals which would have permitted direct review of representation determinations. Consciously balancing the advantages of permitting direct review against the disadvantages—especially the likelihood that direct review would result in dilatory tactics in representation proceedings—Congress explicitly determined, in the original Act, to preclude such review.[11] In 1937, Congress was asked to reconsider the question of judicial review of Board representation determinations and again rejected proposals to permit such review, declining to change the limited review provisions of Section 9 (d).[12]

The problem was again considered by Congress in 1947, when it enacted the Taft-Hartley amendments to the Act. Section 10 (f) of the House bill, following the 1937 proposal, provided for direct review by the Courts of Appeals of Board certifications (H. Rep. No. 245, 80th Cong., 1st Sess., pp. 43, 59–60, 1 Legislative History of the Labor Management Relations

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[11] See S. Rep. No. 573, 74th Cong., 1st Sess., pp. 5–6, in 2 Leg. Hist. of the National Labor Relations Act, 1935 (G. P. O., 1935), p. 2305; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 7, 2 Leg. Hist., 1935, p. 3053.

[12] See Hearings before the Senate Committee on Education and Labor on S. 1000, *et al.*, 76th Cong., 1st Sess., pp. 460–463, 584–585; *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 409–411; *Madden* v. *Brotherhood*, 147 F. 2d 439, 443–444 (C. A. 4).

Act, 1947 (G. P. O., 1948), pp. 334, 350-351). Opponents of this proposal argued, however, that to permit direct review of Board certifications would have serious adverse consequences on collective bargaining, by tending to encourage litigation at the certification stage of Board proceedings. See H. Min. Rep. No. 245, 80th Cong., 1st Sess., p. 94, 1 Leg. Hist., 1947, p. 385. In conference, this provision was eliminated, and it was decided to retain the limited review provided in Section 9 (d) of the original Act. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 56–57, 1 Leg. Hist., 1947, pp. 560–561. Senator Taft explained that, in conference, "the House yielded to the view of the Senate conferees that such provision would permit dilatory tactics in representation proceedings" (93 Cong. Rec. 6444, 2 Leg. Hist., 1947, p. 1542).

With respect to the question of direct judicial review, there is no validity to the distinction, made by the court below, between a representation determination which entails the exercise of Board expertise or discretion and one which, as here, involves the application of a specific statutory requirement (Appendix A, pp. 18–19, *infra*). Direct judicial review of Board representation determinations involving the application of statutory rules affects the length of time in finally resolving representation cases, and thus nullifies the Congressional objective outlined above, no less than direct review of "discretionary" determinations. Moreover, since the Board clearly has no statutory authority to act in an arbitrary and capricious manner, virtually every Board determination in a representation proceeding could be cast in terms of an

alleged excess of statutory authority, thereby completely circumventing Congress' intention to limit the reviewability of such proceedings."[13]

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
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STEPHEN LEONARD,
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National Labor Relations Board.

DECEMBER 1957.

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[13] The reviewability of the Board's representation determinations is not enlarged by the Administrative Procedure Act (5 U. S. C. 1001, *et seq.*). Section 10 thereof expressly excepts from its judicial review provisions the situation where: "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." See *International Union of Operating Engineers, Local No. 148* v. *International Union of Operating Engineers, Local No. 2*, 173 F. 2d 557, 559 (C. A. 8); *Fay* v. *Douds*, 78 F. Supp., 703, 705 (S. D. N. Y.), affirmed, 172 F. 2d 720 (C. A. 2); *White* v. *Herzog*, 80 F. Supp. 407, 411 (D. D. C.); Attorney General's Manual on the Administrative Procedure Act (U. S. Dept. of Justice, 1947) pp. 94–95.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13701

BOYD S. LEEDOM, ET AL., individually and as Chairman and Members of and Constituting the NATIONAL LABOR RELATIONS BOARD, APPELLANTS

v.

WILLIAM KYNE, individually and as President of Buffalo Section, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, a voluntary unincorporated Labor Organization, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided September 16, 1957

Before BAZELON, BASTIAN and BURGER, Circuit Judges.

BAZELON, *Circuit Judge:* Appellee, President of the Westinghouse Engineers Association,[1] brought this suit against appellant members of the National Labor Relations Board to set aside a certification under § 9 of the National Labor Relations Act. The unit certified consisted of 233 admittedly professional employees, within the meaning of § 2 (12) of the Act, whom the Engineers Association had sought to represent;

[1] The full name of this organization is Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America.

and 9 others, admittedly non-professional, whom the Board included, over objection of the Engineers Association, because they share a "close community of employment interest" with the professionals and their inclusion would not "destroy the predominantly professional character" of the unit. The District Court, however, agreed with the Engineers Association that inclusion of these non-professionals violated § 9 (b) which provides, in pertinent part, "that the Board shall not (1) decide that any unit is appropriate for [purposes of collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." Accordingly, on cross motions, the court granted summary judgment in favor of appellee and against appellants.

On this appeal, as in the court below, the Board takes the familiar position that, under § 9 (d), its determinations in representation proceedings are reviewable only in the courts of appeals and only when they have become the basis for a "final order" in an unfair labor practice proceeding under § 10. It relies heavily on *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297 (1943).

"Before we can decide whether these proceedings are reviewable in an original equity suit in the District Court, there must be a showing 'of unlawful action by the Board and resulting injury . . . by way of departure from statutory requirements or from those of due process.' *Inland Empire District Council, etc.* v. *Millis,* 1945, 325 U. S. 697, 700, 65 S. Ct. 1316, 89 L. Ed. 1877." *DePratter* v. *Farmer,* 98 U. S. App. D. C. 74, 76, 232 F. 2d 74, 76 (1956). Equitable relief is clearly barred in the wide area of determinations which depend on the Board's expertise

and discretion; as for example, in *Switchmen's Union*, that railroad yardmen should be included in a unit with certain other smaller groups of railroad employees, or, in *DePratter*, that full time production employees should be included in a unit with employees who devote only part time to production and the rest to other tasks.

This case, however, presents "a different 'type of problem.'"[2] Section 9 (b) (1) expressly forbids inclusion of professionals and non-professionals in the same bargaining unit "*unless* a majority of [the] professional employees vote for inclusion in such unit." It is clear that this provision was intended to protect the professionals; that the professionals' right to this benefit does not depend on Board discretion or expertise; and that denial of this right must be deemed to result in injury. Thus this case presents Board violation of a statutory requirement and resulting injury.

Whether, granting the availability of a § 10 remedy, the injury flowing from the violation of § 9 (b) (1) would support equitable relief need not be decided. Here review by way of § 10 is too remote and conjectural to be viewed as providing an adequate remedy. *Farmers* v. *United Electrical, Radio & Machine Workers*, 93 U. S. App. D. C. 178, 211 F. 2d 36 (1953). Since the employer is not aggrieved by the Board's inclusion of the nine non-professionals, he cannot be relied upon to refuse to bargain and thus make it possible for the Association to bring a reviewable § 10 proceeding. Nor is it likely that an Engineers Association refusal to bargain for the nine non-profes-

[2] *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 89 U. S. App. D. C. 24, 27, 189 F. 2d 685, 688 (1951); see also *Farmer* v. *United Electrical, Radio & Machine Workers*, 93 U. S. App. D. C. 178, 211 F. 2d 36 (1953), *cert. denied*, 347 U. S. 943 (1954); *Leedom* v. *International Union*, 352 U. S. 145 (1956).

sionals would induce the employer to seek review since he would then be free to deal with all employees individually. Nor could we expect such refusal to induce any of the nine non-professionals to seek review. They are hardly likely to insist upon placing their fate in the hands of a reluctant bargaining representative.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1957

No. 13,701

BOYD S. LEEDOM, et al., individually and as Chairman and Members of and constituting the NATIONAL LABOR RELATIONS BOARD, APPELLANTS

v.

WILLIAM KYNE, individually and as President of Buffalo Section, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, a voluntary unincorporated Labor Organization, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Before BAZELON, BASTIAN, and BURGER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated September 16, 1957.

Per Circuit Judge BAZELON.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

SEC. 2. When used in this Act—

* * * * *

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

* * * * *

SEC. 9. (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes

both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

* * * * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * * *

SEC. 10. (e) The Board shall have power to petition any United States court of appeals (including

the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the United States District Court for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was

alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

Section 1337 of the Judicial Code (28 U. S. C.) provides as follows:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Section 10 of the Administrative Procedure Act (5 U. S. C. 1009) provides in relevant part as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of review.*

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1957

BOYD S. LEEDOM, ET AL., INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

WILLIAM KYNE, INDIVIDUALLY AND AS PRESIDENT OF BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, A VOLUNTARY UNINCORPORATED LABOR ORGANIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Question presented	2
Statement	2
A. The Board representation proceeding giving rise to this suit	2
B. The instant suit	6
Summary of argument	9
Argument	12
Congress intended to preclude review of Board representation determinations in the District Court	12
A. On its face, the National Labor Relations Act indicates a purpose to limit judicial review of representation determinations	
B. The legislative history of both the original and amended Acts confirms that Congress intended to preclude judicial review of representation determinations except to the limited extent permitted by Section 9 (d)	17
C. This clear manifestation of Congress's intent would preclude the federal district courts from exercising a reviewing jurisdiction over Board representation determinations, even though it may be alleged that the Board has acted unlawfully	27
D. Since the Board's position on the statutory issue which it decided had a rational basis, judicial review is not required in this case on the theory that it may be necessary in order to correct wholly arbitrary agency action	33
Conclusion	37
Appendix	39

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CITATIONS

Cases:

	Page
Amalgamated Utility Workers v. *Consolidated Edison Co.*, 309 U. S. 261	13
Amazon Cotton Mill Co. v. *Textile Workers Union*, 167 F. 2d 183	16
American and European Agencies v. *Gillilland*, 247 F. 2d 95, certiorari denied, 355 U. S. 884	24
American Federation of Labor v. *National Labor Relations Board*, 308 U. S. 401	12, 14, 17
Boeing Airplane Co., 86 N. L. R. B. 368	37
Continental Motors Corp., 77 N. L. R. B. 345	37
DePratter v. *Farmer*, 232 F. 2d 74	24
Douds v. *International Longshoremen's Association*, 147 F. Supp. 103, affirmed, 241 F. 2d 278	23
Estep v. *United States*, 327 U. S. 114	14
Farmer v. *United Electrical, Radio & Machine Workers*, 211 F. 2d 36, certiorari denied, 347 U. S. 943	33
Fay v. *Douds*, 172 F. 2d 720	26
Federal Telecommunications Laboratories, Inc., 92 N. L. R. B. 1395	37
Fitzgerald v. *Douds*, 167 F. 2d 714	23, 26
Foreman & Clark, Inc. v. *National Labor Relations Board*, 215 F. 2d 396	25
Harmon v. *Brucker*, Nos. 80 and 141, October Term, 1957, decided March 3, 1958	13, 14
Heikkila v. *Barber*, 345 U. S. 229	14, 33
Housewright v. *Hull*, 104 F. Supp. 234	26
Inland Empire District Council v. *Millis*, 325 U. S. 697	12, 26, 30, 32
International Union, etc. v. *International Union, etc.*, 173 F. 2d 557	26, 33
Kirkland v. *Atlantic Coast Line R. Co.*, 167 F. 2d 529, certiorari denied, 335 U. S. 843	33
Leedom v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145	32, 33
Madden v. *Brotherhood and Union of Tr. Employees*, 147 F. 2d 439	16, 20, 26
May Department Stores Co. v. *National Labor Relations Board*, 326 U. S. 376	8, 22
Meat & Provision Drivers Union, 115 N. L. R. B. 890	22

Cases—Continued

	Page
Mechanics Educational Society v. *Schauffler*, 103 F. Supp. 130	26
Miller Electric Co., 101 N. L. R. B. 1014	37
National Labor Relations Board v. *Falk Corp.*, 308 U. S. 453	15
National Labor Relations Board v. Gullett Gin Co., 340 U. S. 361	37
New Bedford Loomfixers Union v. *Alpert*, 110 F. Supp. 723	25
Pacific Gas & Electric Co., 98 N. L. R. B. No. 130	37
Parks v. *Atlanta Printing Pressmen & Assistant's Union*, 243 F. 2d 284, certiorari denied, 354 U. S. 937	22
Potomac Electric Power Co., 99 N. L. R. B. 219	37
Schwarz Laboratories, Inc., 89 N. L. R. B. 930	37
Shaughnessy v. *Pedreiro*, 349 U. S. 48	14
Squibb & Sons, E. R., 83 N. L. R. B. 792	37
Standard Oil Co., 107 N. L. R. B. 1524	37
Stark v. *Wickard*, 321 U. S. 288	13, 14
Switchmen's Union v. *National Mediation Board*, 320 U. S. 297	11, 13, 14, 16, 27, 28, 29, 30, 31, 32, 33
Tungsten Mining Corp. v. *District 50, etc.*, 242 F. 2d 84, certiorari denied, 355 U. S. 821	22
Westinghouse Electric Corp., 80 N. L. R. B. 591	37
Westinghouse Electric Corp., 89 N. L. R. B. 8	37
Westinghouse Electric Corp. v. *National Labor Relations Board*, 236 F. 2d 939	25
White v. *Herzog*, 80 F. Supp. 407	26, 33

Statutes:

Administrative Procedure Act, Section 10 (60 Stat. 237, 5 U. S. C. 1009)	6, 12, 33, 44
Labor-Management Relations Act, 1947, Sec. 401, 29 U. S. C., 1946 ed., Supp. V, 191	24
National Industrial Recovery Act, Section 7 (a), 48 Stat. 198	17
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*):	
Section 2 (12)	3, 4, 39
Section 8 (a) (5)	22, 39–40
Section 8 (b) (3)	8, 22, 23, 40
Section 8 (b) (4) (C)	22, 40
Section 9	9, 15, 27, 40

Statutes—Continued Page

Section 9 (b) (1)..... 5, 7, 8, 11, 12, 24, 34, 35, 36, 37, 40
Section 9 (b) (2)..... 25, 41
Section 9 (c)..... 2
Section 9 (c) (5)..... 25, 41
Section 9 (d)..... 8, 9, 10, 15, 17, 18, 20, 21, 22, 23, 27, 41
Section 9 (h)..... 32
Section 10 (e)..... 8, 9, 14, 23, 30, 42
Section 10 (f)..... 8, 9, 14, 20, 23, 30, 42
Section 10 (j)..... 9, 16, 30
Section 10 (l)..... 9, 16, 17, 30
Section 11 (2)..... 9, 16
Public Resolution 44, June 19, 1934, 48 Stat. 1183..... 17, 18
Railway Labor Act:
Section 2, Fourth..... 28
Section 2, Ninth..... 27
Section 3, First (p)..... 28
Section 9, Third (a)..... 28
28 U. S. C., 1940 ed., 41 (8)..... 28
28 U. S. C. 1337..... 28, 43

Miscellaneous:
Annual Reports of the National Labor Relations Board:
Thirteenth Annual Report, p. 40, n. 19..... 37
Fourteenth Annual Report, p. 38..... 37
Twenty-first Annual Report, p. 164..... 26
93 Cong. Rec. 6444, 2 Leg. Hist. of the Labor Management Relations Act, 1947, p. 1542..... 21
Davis, *Administrative Law* (West, 1951), pp. 832–838.. 14
Hearings before the Joint Committee on Labor-Management Relations, 80th Cong., 2d sess., pp. 1147–1148..... 37
Hearings before the Senate Committee on Education and Labor on S. 1000, et al., 76th Cong., 1st sess., pp. 584–585..... 20
Hearings before the Senate Committee on Labor and Public Welfare on S. 55, *et al.*, 80th Cong., 1st sess., pp. 1702–1712..... 36
H. Conf. Rept. No. 510, 80th Cong., 1st sess., pp. 56–57, 1 Leg. Hist. 1947, pp. 560–561..... 21
H. Min. Rept. No. 245, 80th Cong., 1st sess., p. 94, 1 Leg. Hist. 1947, p. 385..... 21

Miscellaneous—Continued

	Page
H. Rep. No. 245, 80th Cong., 1st sess., 43, 59–60, 1 Leg. Hist. of the Labor Management Relations Act, 1947, pp. 174, 199–200, 334, 350–351	20
H. Rep. No. 1147, 74th Cong., 1st sess., p. 7, 2 Leg. Hist., N. L. R. A., 1935, p. 3053	18
H. R. 3020, 80th Cong., 1st sess	34
1 Leg. Hist. of the Labor Management Relations Act, 1947 (G. P. O., 1948), p. 417	35
1 Leg. Hist., 1947, pp. 62, 327, 540	35
2 Leg. Hist., 1947, p. 1077	36
S. Rep. No. 573, 74th Cong., 1st sess., pp. 5–6, 2 Leg. Hist. of the National Labor Relations Act, 1935 (G. P. O., 1935), p. 2305	18

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 633

BOYD S. LEEDOM, ET AL., INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

WILLIAM KYNE, INDIVIDUALLY AND AS PRESIDENT OF BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, A VOLUNTARY UNINCORPORATED LABOR ORGANIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 37–39) is reported at 249 F. 2d 490. The findings, conclusions, and order of the district court, which are unreported, are set forth at R. 24–32.

JURISDICTION

The judgment of the court below (R. 40) was entered on September 16, 1957. The writ of certiorari

was granted on January 13, 1958 (R. 41). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), and of other relevant statutes are set forth in the Appendix, pp. 39–44, *infra*.

QUESTION PRESENTED

Whether a federal district court has jurisdiction to set aside a certification issued by the National Labor Relations Board under Section 9 (c) of the National Labor Relations Act, as amended, upon allegations by the labor organization receiving the certification that the Board failed to comply with statutory requirements in establishing the bargaining unit covered by the certification.

STATEMENT

A. The Board representation proceeding giving rise to this suit

On October 15, 1955, respondent, the president of the Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America (hereinafter called the Engineers Association), filed with a Regional Director of the Board a representation petition under Section 9 of the Act (R. 3–4, 11, 25–26). This petition sought an election for the purpose of certifying the Engineers Association as the exclusive bargaining agent for a unit of about 166 engineering employees in five job classifications, working at the Cheektowaga, New York, plant of the Westinghouse Electric Corporation. The five classifications were

engineer, engineer associate, engineer assistant, engineer senior, and engineer fellow (R. 3, 12–13, 25–26). At the hearing, held on March 7 and 8, 1956, before a Board hearing officer, the Engineers Association moved to amend the unit specified in its petition so as to include five additional groups of engineers working at the plant, totaling about 67 employees (R. 4, 13, 26).

The Buffalo Salaried Employees Association (hereinafter called the Salaried Employees), which had been permitted to intervene,[1] agreed that all of the approximately 233 (166 plus 67) employees whom the Engineers Association sought to represent were professional employees within the meaning of Section 2 (12) of the Act (R. 4, 11, 13, 26). It contended, however, that five other categories of employees, embracing fourteen persons, were similarly professional employees and that they should also be included in the professional unit. These five other categories were engineer order service, engineer test record, engineer contact, order correspondent master, and safety inspector (R. 4, 13, 26). The Engineers Association opposed the inclusion of these last categories of employees on the ground that the persons covered thereby were not professional employees (R. 13).

The Board, on the basis of the record adduced at the hearing, issued a decision on May 28, 1956, directing the holding of a representation election (R. 4–5,

[1] The Salaried Employees had been certified by the Board in 1946 as the representative for a combined unit consisting of two groups of professional employees and one group of salaried nonprofessional employees (R. 13, n. 5).

11–18, 26–28). The Board held, as the parties had stipulated, that the 166 employees named by the Engineers Association in its petition, as well as the 67 other engineering employees it later sought to include in the proposed unit, were all professional employees within the meaning of Section 2 (12) of the Act (R. 4, 13, 26–27). The Board further held that none of the five categories of employees (covering 14 additional persons) whom the incumbent Salaried Employees Association sought to include were professional employees within Section 2 (12) (R. 4–5, 14–16, 27). However, the Board concluded that the nonprofessional employees occupying the three job classifications of engineer order service, engineer test record, and engineer contact shared a "close community of employment interest" with the professional engineers;[2] and that, since they constituted only nine employees, their inclusion with the 233 professional employees would not "destroy the predominantly professional character" of the unit proposed for the professional engineer employees (R. 5, 14–16, 27).

[2] In this connection, the Board noted that these employees had considerable engineering education and engineering experience, were occasionally transferred to the professional engineering categories, worked in the same general area and under common supervision with the professional engineers, collaborated and consulted with the professional engineers, and voted with the professional engineers in the 1946 election (n. 1, *supra;* R. 13–15, 16). The other employees urged by the Salaried Employees, *i. e.*, the correspondent masters and safety inspectors, the Board noted, did not share this mutuality of employment interests and had not been included with the engineers in the 1946 election (R. 15–16).

In so deciding, the Board concluded that the provisions of Section 9 (b) (1) of the Act[3] did not require it to afford the approximately 233 professional employees a separate self-determination election to determine whether they desired to have the nine nonprofessional employees included in the same collective bargaining unit. As shown by the cases cited in its decision (R. 16, n. 7), it has consistently been the Board's position that this section was designed to apply only where the professional employees constitute the minority group in a proposed unit, in which event a separate self-determination election would be necessary to afford them an effective voice in selecting the bargaining representative. In the Board's view, Congress did not intend the provisions of this section to empower professional employees to limit the scope of a unit in which they constitute a clear majority, thereby depriving other employees with a close community of employment interests of the most suitable means of exercising their collective-bargaining rights.

Accordingly, the Board directed an election in the combined unit of the 233 professional employees and the nine nonprofessionals. The unit was described as follows (R. 5, 17–18; 27–28):

> All professional employees, including the categories of engineer assistant, engineer associate, engineer, engineer senior, engineer fellow,

[3] Insofar as relevant here, Section 9 (b) (1) provides:
"*Provided*, That the Board shall not (1) decide that any unit is appropriate for [purposes of collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit * * *."

> manufacturing engineer, manufacturing engineer senior, plant layout engineer, methods engineer (formerly time and motion analyst), purchasing engineer, engineer order service, engineer test record, and engineer contact, but excluding the categories of machine designer, order correspondent master, and safety inspector, all other employees, guards, and supervisors as defined in the Act.

The employees were afforded the choice of selecting the Engineers Association, the Salaried Employees Association, or neither, as their bargaining representative (R. 5, 17–18, 28).

On June 14, 1956, an election by secret ballot was conducted among the employees in this unit (R. 6, 19, 29). A majority of the employees designated the Engineers Association as their collective bargaining representative, giving that Association 126 of the 228 votes cast (R. 6, 21–22, 29). Thereafter, on June 21, 1956, the Engineers Association was certified as the exclusive bargaining agent of the unit described in the Board's direction of election (R. 6, 19–20, 29).

B. The instant suit

On July 12, 1956, respondent, president of the union certified by the Board, instituted this suit in the United States District Court for the District of Columbia for the purpose of having the certification reviewed and set aside. The jurisdiction of the court was invoked under 28 U. S. C. 1337 and Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009 (R. 2). The gravamen of the complaint was that the Board "exceeded the scope of [its] statutory

authority" and "failed and refused to comply with Section 9 (b) (1) of [the] Act" (R. 7–8) by determining that a unit composed of 233 professioonal employees and nine nonprofessional employees was appropriate for the purpose of collective bargaining, without first affording the professional engineering employees a separate election to determine whether or not they desired to be included with the nonprofessional employees.

The Board moved to dismiss the complaint or, in the alternative, for summary judgment in its favor, on the grounds that the district court was without jurisdiction of the subject matter and that the complaint failed to state a claim warranting judicial relief. Respondent thereafter filed a cross-motion for summary judgment (R. 20–21, 23).

On December 3, 1956, the district court denied the Board's motion and granted respondent's motion for summary judgment (R. 23). The court held that it had jurisdiction to review the Board's representation determination; that Section 9 (b) (1) of the Act was applicable; and that the Board exceeded its statutory authority in failing to afford the professional employees a separate self-determination election (R. 30). The court entered an order (R. 31–32) which directs the Board to set aside and vacate the prior election and certification, and to process further the representation petition filed by the Engineers Association. The order restrains the Board from finding a unit including both professional employees and nonprofessional employees to be appropriate for purposes of

collective bargaining without first affording the professional employees a self-determination election.

The Board appealed to the court below. Without contesting the district court's interpretation of Section 9 (b) (1), the Board contended that Congress intended to preclude judicial review of Board representation determinations except to the limited extent provided in Sections 9 (d) and 10 (e) and (f) of the Act, *i. e.*, where the determination had become the basis for an unfair labor practice order and that order was before the Court of Appeals for review or enforcement. On September 16, 1957, the court below affirmed the decision of the district court, holding that "review by way of § 10 is too remote and conjectural to be viewed as providing an adequate remedy" in this case (R. 39).[4] It held further that the representation determination could be reviewed by an original equity suit in the federal district court, since the issue presented was not "in the wide area of determinations which depend on the Board's expertise and discretion," but entailed "Board violation of a

[4] The Board had contended that the union conceivably could have obtained review of the certification under the statutory review procedure. That is, the union could have refused to bargain with the Company except for a unit of only professional employees, thereby subjecting itself to a charge that it had violated Section 8 (b) (3) of the Act. Were the Board then to issue an order requiring the union to bargain in the unit covered by the certification, the union could obtain review of that order and the underlying certification under Sections 9 (d) and 10 (e) or (f) for, when such an order is brought to the Court of Appeals upon a petition for review or enforcement, the validity of the representation determination itself is open to full judicial review. *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376.

statutory requirement and resulting injury" (R. 38–39).

SUMMARY OF ARGUMENT

A. On its face, the National Labor Relations Act indicates a purpose to limit judicial review of Board representation determinations. Section 10 (e) and (f) provides for review, in the appropriate Court of Appeals, of a final Board order entered in an unfair labor practice proceeding under Section 10. The Act refers to court review of Section 9 representation proceedings in but one instance. Section 9 (d) provides that when a certification has become the basis for an unfair labor practice order, and that order is before the Court of Appeals under Section 10 (e) or (f), the certification itself is also open to review.

The fact that Congress made representation proceedings judicially reviewable in only this situation suggests not merely a purpose to preclude a broader review by the Court of Appeals, but also an intention to bar such review by the district court. This inference is strengthened by the further circumstance that the Act does confer jurisdiction upon the district courts in respect to other matters. See Sections 11 (2), 10 (j), and 10 (l).

B. The legislative history of both the original and amended Acts confirms that Congress intended to provide only the limited review of representation determinations permitted by Section 9 (d). In 1935 when the original Act was passed, two years later, and again when the 1947 amendments were enacted, Congress considered proposals which would have expanded court review of Board representation deter-

minations so as to provide, *inter alia*, a method of direct review for employees and labor organizations who were adversely affected by a Board representation determination and could not obtain review pursuant to Section 9 (d) of the Act. Congress rejected these proposals and decided to retain the limited review provided by Section 9 (d), because it believed that broader review would result in dilatory tactics in representation cases, thus frustrating the statute's basic policy of promoting collective bargaining.

The distinction drawn by the court below—between a representation determination which entails the exercise of Board expertise or discretion, and one which involves the application of a specific statutory requirement—is not supported by the legislative history. Direct judicial review of Board representation determinations involving the application of statutory rules would nullify Congress' objective of avoiding delay in representation proceedings no less than direct review of other Board action in representation proceedings. Moreover, virtually every challenge to Board action in a representation proceeding can be cast in terms of breach of statutory authority, thereby defeating Congress's purpose in limiting judicial review of such proceedings.

C. This clear manifestation of Congress's purpose to preclude judicial review, except to the extent specified in Section 9 (d) of the Act, has the effect of withdrawing from federal district courts any jurisdiction under their general equity powers to review Board determinations, at least in the absence of a substantial

constitutional question. Precisely in point is the decision in *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, arising under the Railway Labor Act, a case in which a labor organization sought to contest a certification by the Mediation Board on the ground that it had acted erroneously as a matter of law. After examination of the type of problem involved, the history of the statute, and the highly selective manner in which Congress provided for judicial review under the Railway Labor Act, this Court concluded that Congress intended to preclude judicial review of representation proceedings, even though questions of law might be involved. Application of the same criteria of judgment to this case leads to the same conclusion. Indeed, the case for preclusion of review under the National Labor Relations Act is even stronger in the light of Congress's specific rejection of proposals for direct review of representation proceedings.

D. Although we do not believe that the Board's decision on the merits is before this Court or that the correctness of the Board's position on the merits is strictly relevant to the question of reviewability which is here, the Court might consider that in a situation characterized by complete arbitrariness there would be special reasons for implying the availability of a review procedure not otherwise open. We point out, therefore, that the Board's settled interpretation of Section 9 (b) (1) has rational basis.

Although the literal language of the section may suggest that the Board is required to afford profes-

sional employees a self-determination election *whenever* it is proposed to group them in a unit with other employees, the legislative history indicates that the provision had a narrower purpose. This history shows that Section 9 (b) (1) was merely aimed at protecting professional employees from being engulfed in a larger bargaining unit against their will. The Board's interpretation—which accords professional employees a self-determination election when they constitute a minority group in the proposed bargaining unit, but not where, as here, they constitute the predominant majority—thus effectuates the Congressional purpose. Moreover, Congress has been aware of the Board's interpretation of Section 9 (b) (1) from the early date that it was first enunciated, and has in effect acquiesced in it.

ARGUMENT

Congress intended to preclude review of Board representation determinations in the District Court

This case presents a question which the Court has twice reserved—whether a Board certification of a bargaining representative may be reviewed by an original action in a federal district court. See *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 412; *Inland Empire District Council* v. *Millis*, 325 U. S. 697, 700. The general jurisdiction conferred on the district court by 28 U. S. C. 1337 and by Section 10 of the Administrative Procedure Act would authorize review of Board representation determinations, unless Congress, by the National Labor Relations Act, has foreclosed such

review. For, "constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 301. And, with respect to the National Labor Relations Act in particular, this Court has recognized that "Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective." *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261, 264.

Here, as in the *Switchmen's* case, "the type of problem involved and the history of the statute in question become highly relevant" (320 U. S. at 301) in deciding whether district court jurisdiction has been restricted.[5] In our view, an examination of

[5] *Harmon* v. *Brucker*, Nos. 80 and 141, October Term, 1957, decided March 3, 1958, does not establish any different principle. In that case, the Court held that the district court possessed jurisdiction to review certain discharges granted by the Secretary of the Army, alleged to be beyond his statutory authority, though the underlying statute provided that the findings of the Secretary were to be "final." The Court stated that: "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." The fact that judicial review "generally" is available does not mean that there may not be some circumstances where Congress will be deemed to have foreclosed such review. Indeed, one of the cases cited in *Harmon* is *Stark* v. *Wickard*, 321 U. S. 288, where the Court, although holding that judicial review was available in the situation there presented, expressly distinguished the *Switchmen's* case, *supra*, on the ground that the nature and character of the legislation in that case had made clear that Congress did not intend to

these factors reveals that Congress intended to preclude review of Board representation determinations in the district court.

Before turning to these factors, however, it should be noted that the administrative action challenged does not involve an alleged denial of procedural due process or any other constitutional question. Respondent's union was afforded a full hearing before the Board on its contention that the nine nonprofessional employees should be excluded from the bargaining unit, the union participated in the ensuing representation election, and, indeed, was subsequently certified by the Board as an exclusive bargaining agent.

A. On its face, the National Labor Relations Act indicates a purpose to limit judicial review of representation determinations

Section 10 (e) and (f) of the Act provides for review in the appropriate Court of Appeals of a final "Board order." In *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, this

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provide a judicial remedy (see 321 U. S. 288, 303, n. 17, 306–307).

In short, as we read *Harmon*, it merely shows that, considering the particular statute and the nature of the administrative action there involved, the Court was not convinced that Congress had unequivocally manifested an intention to preclude judicial review. The fact that the statute provided that the Secretary's finding shall be "final" is not decisive, but only one factor to be considered in making this determination. Cf. *Heikkila* v. *Barber*, 345 U. S. 229, with *Shaughnessy* v. *Pedreiro*, 349 U. S. 48. See, also, *Estep* v. *United States*, 327 U. S. 114; Davis, *Administrative Law* (West, 1951), pp. 832–838. We believe that here, as in the *Switchmen's* case, all of the circumstances warrant the conclusion that Congress did intend to bar district court review.

Court concluded that "Board order" means a final order entered in an unfair-labor-practice proceeding under Section 10, and that accordingly a Board certification—which is the culmination of a representation proceeding conducted under Section 9—is not directly reviewable in the Court of Appeals. The Court's conclusion rested heavily on the fact that the Act refers to court review of Section 9 representation proceedings in but one instance—i. e., when a certification has become the basis for an unfair labor practice order, and that order is itself before the Court of Appeals for review or enforcement. Thus, Section 9 (d) provides:

> Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

The fact that Congress made representation proceedings judicially reviewable in only this situation[*] suggests, not merely a purpose to preclude a broader review by the Court of Appeals, but an intention to

[*] Cf. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 458–459.

bar such review by the district courts as well. "All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. * * * In such a case the specification of one remedy normally excludes another." *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301. Moreover, as the Fourth Circuit has observed, "[i]t is hardly possible that Congress should have intended to permit review by District Courts of 9(c) proceedings while so carefully limiting review of such proceedings in the Circuit Courts of Appeals to cases in which an order under 10(c) has been entered." *Madden* v. *Brotherhood and Union of Tr. Employees*, 147 F. 2d 439, 442.

This conclusion finds further support in the fact that the Act does confer jurisdiction upon the district courts in respect to other matters. Section 11 (2) empowers the district court to entertain applications for the enforcement of Board subpenas. And, in amending the Act in 1947, Congress added Sections 10 (l) and 10 (j), which empower the district court to grant temporary injunctive relief against unfair labor practice conduct.[1] Having thus undertaken to assign roles to the district court in the administration of the Act, it could be expected that Congress, had it desired them to play a part in representation proceedings, would have said so. Cf. *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183, 186–187 (C. A. 4), holding that Sections 10 (j) and

[1] The amendments to the Act are contained in Title I of the Labor-Management Relations Act of 1947. Other titles of the latter Act confer additional jurisdictions upon the district court. See *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183, 187–188 (C. A. 4).

10 (l), which empower the Board to petition the district court for injunctive relief, evidence Congress's intention to deny such right to private parties.

B. The legislative history of both the original and amended Acts confirms that Congress intended to preclude judicial review of representation determinations except to the limited extent permitted by Section 9 (d)

The legislative history of both the original and amended Acts confirms that Congress intended to provide only the limited review of representation determinations permitted by Section 9 (d). It demonstrates, indeed, that Congress considered and deliberately rejected any broader review of representation determinations because of its belief that this would result in dilatory tactics in representation proceedings, thereby frustrating the Act's basic policy of promoting collective bargaining.

Thus, as the Court noted in *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 409–411, the Senate Report on the Wagner Act explained the limited provision for review of representation determinations set forth in Section 9 (d) on the ground that it avoided the situation which had existed under Public Resolution 44,[4] where

> any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a com-

[4] This resolution created the first National Labor Relations Board for the purpose of implementing Section 7 (a) of the National Industrial Recovery Act. See 48 Stat. 198, 1183.

> pany has chosen to contest an election order of the Board, has reached decision in any circuit court of appeals.[9]

Similarly, the House Report stated that the unlimited reviewability of election orders under Public Resolution 44

> has been productive of a large measure of industrial strife. When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, * * * the union, unless an election can promptly be held * * *, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power * * *.[10]

In 1937, Congress was asked to reconsider the question of judicial review of Board representation determinations. As a compromise between the Public Resolution 44 procedure (permitting review at the election stage of a representation proceeding) and the Section 9 (d) procedure (permitting a representation determination to be reviewed only when it became the basis of an unfair labor practice order), it was proposed that the Act be amended so as to permit the representation proceeding to be reviewed in the Court of Appeals as soon as it reached the post-election stage of a certification. In a report submitted to the Senate

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[9] S. Rep. No. 573, 74th Cong., 1st sess., pp. 5–6, in 2 Leg. Hist. of the National Labor Relations Act, 1935 (G. P. O., 1935), p. 2305.

[10] H. Rep. No. 1147, 74th Cong., 1st sess., p. 7, 2 Leg. Hist. NLRA, 1935, p. 3053.

Labor Committee, the Board noted that even this proposal presented very serious problems:

> Proceedings for review of a Board's certification would require from 6 months to a year in the circuit court of appeals. Thereafter the losing party would have 3 months in which to apply for certiorari to the Supreme Court, and if certiorari were granted, several more months would pass before final decision could be rendered. * * * All in all, it can be conservatively estimated that, on the average, it would take a year to obtain court review of a Board certification.
>
> Meanwhile, what is happening to the employees who wish to bargain collectively? If the circuit court of appeals, in order to protect the petitioning labor organization, stays further action by the employer pending review, there can be no collective bargaining in the plant at all during that period. If the court stays further action by the Board, then the employees have no recourse, except industrial warfare, against a refusal to bargain by the employer. If the employer is willing to bargain with the certified union and is permitted to do so by the reviewing court, the rights of the rival union may meanwhile be prejudiced to the same extent as if review had not been sought, either by the loss of membership likely to follow the signing of an agreement with the certified union or possibly by a closed-shop agreement forcing all its members into the certified union. Thus, either collective bargaining is suspended entirely during court review, or the labor organization seeking review incurs most of the disadvantages that would have accrued to it without review.

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> Further, when the decision of the reviewing court comes, and the Board's certification is sustained or set aside, such a long period of time has elapsed that the certification is out of date and futile. At the end of the year required for the review the organization certified may or may not represent the majority. This can only be determined by a new representation proceeding and a new certification, which in turn is subject to review.[11]

Concluding that these considerations outweighed the possible advantages of broadened review of representation determinations, Congress rejected the proposed amendment and declined to change the limited review provision of Section 9 (d).

The problem was again considered by Congress in 1947, when it enacted the Taft-Hartley amendments to the Act. Section 10 (f) of the House amendments, following the earlier 1937 proposal, provided for direct review by the Courts of Appeals of Board certifications (H. Rep. No. 245, 80th Cong., 1st sess., 59–60, 1 Legislative History of the Labor Management Relations Act, 1947 (G. P. O., 1948), pp. 199–200, 350–351). In explanation of this proposal, the House report stated (*id.* at 43, 1 Leg. Hist., 1947, p. 334):

> The present act permits appeals from certifications by the Board only by employers, and then only through cumbersome proceedings that always involve risk of strike and of a finding

[11] Hearings before the Senate Committee on Education and Labor on S. 1000, *et al.*, 76th Cong., 1st sess., pp. 584–585. See, also, the testimony of Board General Counsel Fahy, *id.* at 460–463, quoted in *Madden v. Brotherhood and Union of Tr. Employees*, 147 F. 2d 439, 443–444 (C. A. 4).

> that, by following the only course by which he could appeal, the employer committed an unfair labor practice, no matter how much in good faith he doubted the validity of the certification. This procedure is unfair to everyone; the union that wins, which frequently must wait for many months to exercise its rights; the union that loses, which has no appeal at all no matter how wrong the certification may be: the employees, who also have no appeal; and the employer, for whom an appeal involves grave risks. The bill permits any person interested to appeal from a certification, as from a final order of the Board.

Opponents argued, however, that to permit direct review of Board certifications would have serious adverse consequences on collective bargaining, by tending to encourage litigation at the certification stage of Board proceedings. See H. Min. Rept. No. 245, 80th Cong., 1st sess., p. 94, 1 Leg. Hist., 1947, p. 385. In conference, this provision was eliminated, and it was decided to retain the limited review provided in Section 9 (d) of the original Act. H. Conf. Rept. No. 510, 80th Cong., 1st sess., pp. 56–57, 1 Leg. Hist., 1947, pp. 560–561. Senator Taft explained the reason for this decision as follows (93 Cong. Rec. 6444, 2 Leg. Hist., 1947, p. 1542):

> Subsection 9 (d) of the conference agreement conforms to the Senate amendment. The House bill contained a provision which would have permitted judicial review of certifications even before the entry of an unfair labor practice order. In receding on their insistence on this portion, the House yielded to the view of the Senate conferees that such provision would

permit dilatory tactics in representation proceedings.

In sum, Congress was aware that Section 9 (d) permitted only a limited review of Board representation determinations. Thus, an employer dissatisfied with a Board certification could refuse to bargain on this ground. If, thereafter, the Board should nevertheless issue a bargaining order, the employer's petition to review that order could also bring up the underlying certification. See *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, 379, 385–386, 388. However, as Congress realized, in the usual situation where a union or employees feel aggrieved by a representation determination, *i. e.*, where it results in the certification of a rival union, this method of obtaining review would not be open to them.[12] Congress nevertheless concluded that the ad-

[12] The only conceivable way that a "losing" union could obtain review under Section 9 (d) of a certification issued to another union is by violating Section 8 (b) (4) (C) of the amended Act. That is, were the "losing" union to picket for recognition notwithstanding the certification, it would subject itself to an 8 (b) (4) (C) charge. In the unfair-labor-practice proceeding, the union could then proceed to contest the validity of the underlying certification, and, should the Board overrule this contention and issue an unfair-labor-practice order, this order, together with the underlying certification, could be brought before the Court of Appeals pursuant to Section 9 (d). Cf., however, *Meat & Provision Drivers Union*, 115 N. L. R. B. 890, 891, 901; *Parks* v. *Atlanta Printing Pressmen & Assistant's Union*, 243 F. 2d 284 (C. A. 5), certiorari denied, 354 U. S. 937; *Tungsten Mining Corp.* v. *District 50, etc.*, 242 F. 2d 84 (C. A. 4), certiorari denied, 355 U. S. 821.

The union here, of course, was certified, so that it was in a better position to obtain review of the certification under Section 9 (d). Just as Section 8 (a) (5) makes it an unfair labor practice for an employer to refuse to bargain with the union which is the representative of his employees, Section 8 (b) (3)

vantages of permitting a broader review of certifications were outweighed by the potential disadvantages, and it accordingly declined to go beyond Section 9 (d). As stated by the Second Circuit, "Congress has dealt in section 9(d) with reviews of certification * * * and has provided therein the only relief it means to grant on that subject." *Fitzgerald* v. *Douds*, 167 F. 2d 714, 716.[13]

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makes it an unfair labor practice for that union to refuse to bargain with the employer. Accordingly, the Engineers Association, contending that the Board's certification of a combined unit of professional and nonprofessional employees was erroneous, could insist that Westinghouse bargain with it solely on behalf of the professional employees. The Engineers Association would thus subject itself to a charge, filed either by the employer or the nonprofessional employees in the unit, that it had refused to bargain as required by Section 8 (b) (3), and, should the Board so find and issue an order requiring the Engineers Association to bargain for all of the employees in the certified unit, the Engineers Association could obtain review of that order and the underlying certification in the Court of Appeals, pursuant to Sections 9 (d) and 10 (e) and (f) of the Act, just as the employer could if he were contesting the certification. Cf. *Douds* v. *International Longshoremen's Association*, 147 F. Supp. 103, 109, 110–112 (S. D. N. Y.), affirmed, 241 F. 2d 278, 282 (C. A. 2). However, the court below concluded (p. 8 n. 4, *supra;* R. 39) that this procedure was inadequate because it was not likely that either the employer or the nine nonprofessionals would file unfair-labor-practice charges if the union refused to bargain for the latter. We believe that the Court's assumption is unwarranted, particularly insofar as the filing of charges by the nine nonprofessionals is concerned.

[13] A union unable to obtain judicial review of a representation determination believed to be erroneous is not without a remedy. It may bring the Board's action to the attention of Congress for appropriate corrective action. In order to facilitate such legislative oversight, Congress, in amending the Act, set up a Joint Committee on Labor-Management Relations to

The court below would apparently read the legislative history as indicating a Congressional purpose to limit judicial review of a representation determination which entails the exercise of Board expertise or discretion—*e. g.*, a determination that one unit of production and maintenance employees is more appropriate for bargaining purposes than a separate production unit and a separate maintenance unit [14]—but as not depriving the district court of power to review a determination which, as here, involves the application of a specific statutory requirement (see pp. 8–9, *supra*). The history does not support such a distinction. As we have shown, Congress limited judicial review of representation determinations because of its conclusion that it is better to suffer dissatisfaction with some representation determinations than to have each one bound up in long drawn-out litigation which could frustrate the statute's objective of fostering collective

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study, *inter alia*, the administration and operation of the Act (Sec. 401 of the Labor-Management Relations Act, 1947, 29 U. S. C., 1946 ed., Supp. V, 191). Indeed, the very question involving Section 9 (b) (1) which respondent sought to have reviewed in this suit was brought to the Joint Committee's attention (see p. 37, *infra*).

Cf. *American and European Agencies* v. *Gillilland*, 247 F. 2d 95, 97 (C. A. D. C.), certiorari denied, 355 U. S. 884:

"The assumption that Congress must always contemplate judicial correction of erroneous agency action seems to have its basis in the view that Congress lacks other means to enforce its statutory mandates. But this is not so: Congress can, if it wishes, amend the law * * *; certainly it always has power to investigate and to impeach. When Congress tells the courts that there shall not be review, we will not assume, in the absence of something more, that Congress could not have meant what it said. * * *

[14] Cf. *DePratter* v. *Farmer*, 232 F. 2d 74 (C. A. D. C.)

bargaining. Direct judicial review of Board representation determinations involving the application of statutory rules affects the length of time in finally resolving such cases no less than direct review of other Board determinations in representation proceedings.

Moreover, in deciding whether the matter is within the area of the Board's discretion, it is usually necessary to decide first whether a statutory restriction is applicable. For example, Section 9 (b) (2) provides that the Board shall not decide that any craft unit is inappropriate for bargaining purposes on the ground that a different unit has been established by a prior Board determination. In most cases where the Board denies a craft unit, the contention can be made that a prior determination was the basis for the decision, contrary to Section 9 (b) (2); hence, only by proving this legal contention to be without merit can it be established that the decision was within the area of the Board's discretion.[15] Similar problems would be encountered in connection with Section 9 (c) (5), providing that "the extent to which the employees have organized shall not be controlling" in determining whether a unit is appropriate.[16] And, even where no specific statutory requirement can be relied on, an allegation of arbitrary and capricious action might be deemed sufficient for review purposes on the ground that the Board has no statutory authority to act un-

[15] See *New Bedford Loomfixers Union* v. *Alpert*, 110 F. Supp. 723, 728 (D. Mass.).

[16] See *Foreman & Clark, Inc.* v. *National Labor Relations Board*, 215 F. 2d 396, 406 (C. A. 9); *Westinghouse Electric Corp.* v. *National Labor Relations Board*, 236 F. 2d 939, 943 (C. A. 3).

reasonably. For these reasons, virtually every Board determination in each of the numerous representation proceedings processed by the Board could be cast in terms of an alleged excess of statutory authority,[17] thereby completely frustrating Congress's intention to limit the reviewability of such proceedings.[18]

It is urged that Congress's intention to limit judicial review of representation determinations should be read in the light of the fact that, under the Wagner Act, the Board's discretion in representation cases was virtually unrestricted. The Taft-Hartley amendments, the argument runs, placed specific curbs on this discretion; hence, it should not be assumed that Congress's intention respecting limited judicial review would cover the reviewability of agency action alleged to be violative of these restrictions. This argument overlooks the significant point that Congress reconsidered the question of expanding judicial review of representation determinations at the time of the Taft-Hartley amendments, and it again decided to retain

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[17] See *Inland Empire District Council* v. *Millis*, 325 U. S. 697; *Fitzgerald* v. *Douds*, 167 F. 2d 714 (C. A. 2); *Fay* v. *Douds*, 172 F. 2d 720 (C. A. 2); *International Union, etc.*, v. *International Union, etc.*, 173 F. 2d 557 (C. A. 8); *Madden* v. *Brotherhood and Union of Tr. Employees*, 147 F. 2d 439 (C. A. 4); *White* v. *Herzog*, 80 F. Supp. 407 (D. D. C.); *Houseright* v. *Hull*, 104 F. Supp. 234 (D. Ohio); *Mechanics Educational Society* v. *Schauffler*, 103 F. Supp. 130 (D. Penn).

[18] In the fiscal year 1956, the Board disposed of a total of 8,070 representation cases. Twenty-first Annual Report of the National Labor Relations Board (G. P. O., 1957), p. 164. The test suggested by the court below removes any practical limitation on the number of such cases which could be subjected to review in the district courts.

the limited review provided in Section 9 (d). In short, with full knowledge of the restrictions which it was imposing on the Board's discretion in representation cases, Congress nevertheless elected to retain a provision which would permit review of representation determinations in only limited situations. There is nothing whatever to show that Congress contemplated any distinction between representation determinations under the Taft-Hartley amendments which involved the exercise of discretion and those which involved application of a specific statutory requirement. As to representation proceedings generally, Congress left Section 9 (d) unchanged, and it did so fully conscious of what it was doing.

C. This clear manifestation of Congress's intent would preclude the federal district courts from exercising a reviewing jurisdiction over Board representation determinations, even though it may be alleged that the Board has acted unlawfully

Congress's manifest intent to preclude federal review of Board representation determinations except to the limited extent permitted by Section 9 (d) has the effect, we submit, of withdrawing from federal district courts any jurisdiction which they might otherwise have, under their general equity powers, to review Board representation determinations, at least absent a substantial constitutional question. The decision in *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, is precisely in point.

That case arose out of a certification proceeding under Section 2, Ninth of the Railway Labor Act, a provision analogous to Section 9 of the National

Labor Relations Act. A labor organization aggrieved by the Mediation Board's certification of another labor organization filed suit in a federal district court to have the certification set aside, alleging jurisdiction under 28 U. S. C., 1940 ed., 41 (8) (now § 1337).[19] The Mediation Board had certified the rival labor organization as the representative of all the yardmen for the entire railroad system, including the yardmen (employed at certain yards) whom plaintiff sought to represent as a separate "craft or class" within the meaning of Section 2, Fourth of the Railway Labor Act (320 U. S. at 299, 300–301). The complaining union contended that the Mediation Board had acted erroneously as a matter of law, in that Section 2, Fourth required the Board to treat these employees as a "craft or class," and thus they had the "right" to select a representative by a separate election in their own craft or class (*ibid.*).

This Court, after reference to the type of problem involved,[20] the history of the statute, and the selective manner in which Congress had provided for judicial review of other administrative action under the Rail-

[19] The Railway Labor Act, like the National Labor Relations Act, contains no provision expressly authorizing judicial review of certifications issued by the Mediation Board though, like the latter Act, it contains express statutory provisions for judicial review of other types of administrative actions, *e. g.*, Section 3, First (p), and Section 9, Third (a).

[20] In this connection, the Court observed that the certification proceeding is essentially a fact-finding investigation which, unlike an order involving commands or prohibitions, merely establishes that a majority of the employees in a given bargaining unit desire a particular representative as their bargaining agent. 320 U. S. at 304.

way Labor Act, concluded that the Congressional intent as to representation disputes was plain—"the dispute was to reach its last terminal point when the administrative finding was made," and there "was to be no dragging out of the controversy into other tribunals of law" (320 U. S. at 305). The Court recognized that, if "the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control" (*id.*, at 300). However, insofar as the "right" of the majority of any craft or class of employees to determine their representative was concerned, the Court noted that this right was "protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held" (*id.*, at 301). In these circumstances, it said (*ibid.*):

> A review by the federal district courts of the Board's determination is not necessary to preserve or protect that "right." Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. ***All constitutional issues aside, it is for Congress to determine how the rights which it creates shall be enforced.***

> * * * In such a case the specification of one remedy normally excludes another. [Emphasis added.]

Moreover, the Court added (*id.*, at 303):

> The fact that the certificate of the Mediation Board is conclusive is of course no ground for judicial review. * * * Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one *even where questions of law might be involved.* * * * We need not determine the full reach of that rule. * * * But its application here is most appropriate by reason of the pattern of this Act. [Emphasis added.]

This same reasoning applies with equal force to district court review of representation determinations under the National Labor Relations Act. For, like the Railway Labor Act, the National Labor Relations Act contains no general provisions for judicial review of Board orders or determinations, but carefully delimits the type of order which may be reviewed in the courts and precisely defines the tribunal where review may be sought. See Section 10 (e), (f), (j), and (l) of the Act. Again, as in Mediation Board proceedings, the duties of the Labor Board in representation proceedings are essentially fact-finding investigations to ascertain the desires of a majority of the employees in a given bargaining unit. See *Inland Empire District Council* v. *Millis*, 325 U. S. 697, 706. Indeed, the case for preclusion of such review is

even stronger under this Act, for the Railway Labor Act did not have the history (*supra*, pp. 17–22) present here, showing that Congress specifically considered and rejected proposals to permit direct review of representation determinations.

The force of the *Switchmen's* case may not be discounted by viewing it as entailing only a determination within the area of the Mediation Board's discretion, rather than one involving the limits of the Board's legal authority. The Mediation Board had declined the complaining union's request for a craft union on the ground that the Railway Labor Act "vests the Board with no discretion to split a single carrier * * *." *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 309 (dissenting opinion of Reed, J.). Accordingly, the Mediation Board's conclusion that only a system-wide unit was appropriate necessarily presented a question as to the agency's statutory powers. As Mr. Justice Reed noted in his dissent, the Court's holding that the Mediation Board's determination was unreviewable authorized "the Mediation Board to determine not only questions judicially found to be committed to its discretion * * * but *the statutory limits of its own powers* as well" (*id.*, at 321; emphasis added). In short, the issue presented in *Switchmen's* was the same as that presented here, *i. e.*, whether Congress may be deemed to have precluded judicial review of a representation determination which is alleged to be in excess of the agency's statutory authority.[21]

[21] Nor is a different conclusion required by the statement in the *Switchmen's* case that a preclusion of judicial review would

Finally, the *Switchmen's* case is not rendered inapposite, we submit, by the circumstance that this Court failed to apply it in the subsequent *Inland Empire* case, 325 U. S. 697 (p. 12, *supra*), which involved a National Labor Relations Board certification. In *Inland Empire,* the Court indicated that it would be inappropriate to decide whether the district court had jurisdiction to review a Labor Board certification, absent "some showing that the Board has acted unlawfully" (325 U. S. at 700); it then went on to find that there was no substance to the claim that the Board had erred, and sustained the dismissal of the suit on this ground. Accordingly, in *Inland Empire,* the Court did not reach the question whether the principles of the *Switchmen's* case were applicable to the National Labor Relations Act.[22]

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not be presumed if it meant the obliteration of a right which Congress created (p. 29, *supra*). This statement does not have reference to the situation here, where the "denial" results from the administrative agency's allegedly erroneous interpretation of the statute; it refers only to the situation where there is no *tribunal*, administrative or otherwise, even to apply the statute. For, as the Court went on to indicate (*ibid.*), where Congress has set up an administrative tribunal for resolving representation questions, its actions alone may be regarded as adequate protection for the rights conferred by the statute.

[22] Similarly, no consideration was given to this question in *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145. That was a suit in the district court to enjoin the Board from declaring the union out of compliance with Section 9 (h) because of the falsity of the non-Communist affidavits filed by one of its officers; the union contended that the statute merely empowered the Board to determine whether the required affidavits had been filed, and that the Board thus exceeded its authority in determining whether the affidavits were truthful. Although in the district court the

We submit, therefore, that the doctrine of the *Switchmen's* case is controlling here and requires the conclusion that Congress deprived the district court of jurisdiction to review the Board's representation determination in this case.[23]

D. Since the Board's position on the statutory issue which it decided had a rational basis, judicial review is not required in this case on the theory that it may be necessary in order to correct wholly arbitrary agency action

As argued immediately above, we do not believe that the correctness of the Board's position on the merits is strictly relevant to the question of reviewability, even though the merits involve a statutory issue. We recognize, moreover, that in the Court of

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Board defended this suit on the ground, *inter alia*, that the court lacked jurisdiction to review the Board's action, this ground was not urged before this Court; only the question of the Board's power in respect to false affidavits was presented to this Court (see the Board's Brief in No. 57, October Term, 1956, p. 2). Moreover, it is apparent that the factors which, as we have shown, led Congress to preclude direct review of a Board representation determination were not applicable to the situation presented in the *Mine Mill* case, or in the analogous *Farmer* v. *United Electrical, Radio & Machine Workers*, 211 F. 2d 36 (C. A. D. C.), certiorari denied, 347 U. S. 943.

[23] Assuming the correctness of our position that Congress intended to preclude judicial review except as provided for in the Act, it follows that Section 10 of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1009) does not provide respondent with an independent basis for the instant suit. Section 10 is expressly made inapplicable to "(1) statutes [which] preclude judicial review or (2) agency action [which] is by law committed to agency discretion." *International Union, etc.* v. *International Union, etc.*, 173 F. 2d 557, 559 (C. A. 8); *White* v. *Herzog*, 80 F. Supp. 407, 411 (D. D. C.); *Kirkland* v. *Atlantic Coast Line R. Co.*, 167 F. 2d 529 (C. A. D. C.), certiorari denied, 335 U. S. 843. Cf. *Heikkila* v. *Barber*, 345 U. S. 229, 232–233, 235.

Appeals the Board did not contest the district court's interpretation of the statutory provision involved (Section 9 (b) (1)), but chose to stand on its jurisdictional objections. We undertake, at this point in our argument, to set forth our reasons for believing that the Board's interpretation of Section 9 (b) (1) has a rational basis, not because we think that the merits are before this Court, but because the Court might consider that in a situation characterized by complete arbitrariness there would be special reasons for implying the availability of a review procedure not otherwise open.

In relevant part, Section 9 (b) (1) provides:

> *Provided,* that the Board shall not (1) decide that any unit is appropriate for [purposes of collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; * * *

Although a literal reading of this language may support the conclusion that the limitation was intended to apply *whenever* the Board intended to group professional employees in the same unit as nonprofessional employees, the legislative history of the proviso shows that it had a narrower purpose. Thus, Section 9 (f) (2) of the House Bill (H. R. 3020) required the Board to provide "a separate ballot for [*inter alia*] any * * * profession * * * within a proposed bargaining unit" and to "exclude from the bargaining unit any such group if less than a majority of the

employees in it who cast ballots shall have voted for the representative that the Board shall certify for such unit" (1 Legislative History of the Labor Management Relations Act, 1947, p. 62). The purpose of this provision, the House Report stated, was to prevent "distinguishable *minorities*" from being "forced * * * into bargaining units against their will" (1 Leg. Hist. 327; emphasis added). Respecting the similar Senate provision, which became the present Section (9) (b) (1), the Senate Report explains that its objective was to preclude "covering professional personnel into general units of production and maintenance employees or general units of office and clerical employees" because the professionals, since *"their number is always small in comparison with production or clerical employees,"* might not be adequately represented (1 Leg. Hist. 417; emphasis added). And, in adopting the Senate version, the House Conference Report stated (1 Leg. Hist. 540):

> The House bill did not contain any definition of the term "professional employee," but section 9 (f) (2) thereof gave professional personnel and other distinguishable groups of employees *an opportunity to exclude themselves from larger bargaining units* in which it was proposed that they be included. The Senate amendment accorded a similar treatment to professional employees and defined the term. * * * The conference agreement contains the same definition of "professional employee" as that contained in the Senate amendment, and accords to this category the same treatment which was pro-

vided for them in * * * the House bill. [Emphasis added.] [24]

In short, the legislative history of Section 9 (b) (1) indicates that the provision was merely intended to provide professional employees with a self-determination election when they constituted a minority in a proposed bargaining unit, and not when, as here, they constituted an overwhelming majority. For only in the former situation was there a real danger that, unless the professional employees were given an opportunity to vote separately, they might be swept, against their will, into a larger unit and submerged. On the other hand, to hold a separate election for professional employees where, as here, they constitute an overwhelming majority in the proposed unit, would not be necessary to insure that the views of the professional employees are fully reflected.[25] A separate election for professional employees in this situation would serve only to enable the professional employees to deprive other employees with a close community of employment interests—*e. g.*, the nine nonprofessionals in the unit here (see n. 2, p. 4, *supra*)—of the most suitable means of exercising their collective bargaining rights.

Accordingly, when the Board was first presented with the problem, shortly after Section 9 (b) (1) was

[24] See, also, 2 Leg. Hist., 1947, p. 1077; Hearings before the Senate Committee on Labor and Public Welfare on S. 55, *et al.*, 80th Cong., 1st sess., pp. 1702–1712.

[25] In this case, for example, it is clear that the votes of the nine nonprofessionals did not affect the results of the election (R. 21–22).

added to the Act, it concluded that the Section did not apply to the inclusion of a minor group of non-professional employees in a predominantly professional unit. *Continental Motors Corp.*, 77 N. L. R. B. 345, 347–348). This decision has been uniformly followed since that time.[26] Moreover, promptly after the *Continental Motors* decision, Congress was apprised of the Board's construction of Section 9 (b) (1) of the Act, by Chairman Paul M. Herzog. See Hearings before the Joint Committee on Labor-Management Relations, 80th Cong., 2d Sess., pp. 1147–1148. Congress was also apprised of this construction in 1949 and 1950.[27] Congress, however, has neither criticized the Board's interpretation of Section 9 (b) (1), nor undertaken to modify it. Cf. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365–366.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court should be

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[26] *Standard Oil Co.*, 107 N. L. R. B. 1524, 1525–1526; *Pacific Gas & Electric Co.*, 98 N. L. R. B. No. 130; *Miller Electric Co.*, 101 N. L. R. B. 1014, 1016; *Potomac Electric Power Company*, 99 N. L. R. B. 219; *Federal Telecommunications Laboratories, Inc.*, 92 N. L. R. B. 1395, 1396–1399; *Schwarz Laboratories, Inc.*, 89 N. L. R. B. 930, 931–932; *Westinghouse Electric Corp.*, 89 N. L. R. B. 8, 29, 34; *Boeing Airplane Co.*, 86 N. L. R. B. 368, 371; *E. R. Squibb & Sons*, 83 N. L. R. B. 792; *Westinghouse Electric Corp.*, 80 N. L. R. B. 591, 594–595.

[27] Thirteenth Annual Report of the National Labor Relations Board, p. 40, n. 19; Fourteenth Annual Report of the National Labor Relations Board, p. 38.

reversed, and that the case should be remanded to that court with instructions to dismiss the complaint for lack of jurisdiction over the subject matter.

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National Labor Relations Board.
MARCH 1958.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

SEC. 2. (12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * * (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; * * *

* * * * *

SEC. 9. * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional em-

ployees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

* * * * *

(c) (5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of

the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact

if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceedings, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * * *

Section 1337 of the Judicial Code (28 U. S. C.) provides as follows:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating com-

merce or protecting trade and commerce against restraints and monopolies.

Section 10 of the Administrative Procedure Act (5 U. S. C. 1009) provides in relevant part as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) *Right of review.*
>
> Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

BOYD S. LEEDOM, *et al.*, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF AND CONSTITUTING THE NATIONAL LABOR RELATIONS BOARD,

Petitioners,

v.

WILLIAM KYNE, INDIVIDUALLY AND AS PRESIDENT OF BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, A VOLUNTARY UNINCORPORATED LABOR ORGANIZATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
A. The Board representation proceeding giving rise to this suit	2
B. The instant suit	5
ARGUMENT	6
CONCLUSION	13

Citations.

Cases:

	Page
American Federation of Labor v. *National Labor Relations Board*, 308 U. S. 401	7
Colorado v. *Toll*, 268 U. S. 228	12
DePratter v. *Farmer*, 98 U. S. App. D. C. 74, 232 F. 2d 74	10
Farmer v. *International Fur & Leather Workers Union*, 95 U. S. App. D. C. 308, 221 F. 2d 862	8
Farmer v. *United Electrical Workers*, 93 U. S. App. D. C. 178, 211 F. 2d 36, cert. den., 347 U. S. 943	8, 9
Federal Telecommunications Laboratories, Inc., 92 N. L. R. B. 1395	
Ferris v. *Wilbur*, 27 F. 2d 262	12
Fitzgerald v. *Douds*, 167 F. 2d 714	12
Greenwood v. *United States*, 350 U. S. 366	4
Inland Empire District Council v. *Millis*, 325 U. S. 697	7
International Union of Mine, Mill and Smelter Workers v. *Farmer*, 96 U. S. App. D. C. 416, 226 F. 2d 780	8
Leedom v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145	7, 8
Madden v. *Brotherhood*, 147 F. 2d 439	12
National Labor Relations Board v. *Gullett Gin Co.*, 340 U. S. 361	4
National Labor Relations Board v. *Lion Oil Co.*, 352 U. S. 282	4
Office Employees International Union v. *National Labor Relations Board*, 353 U. S. , 1 L. ed. 2d 846	7

	PAGE
Sonotone Corporation, 90 N. L. R. B. 1236	3
Switchmen's Union of North America v. *National Mediation Board*, 320 U. S. 297	10
Westinghouse Electric Corporation, 107 N. L. R. B. 16	3
Westinghouse Electric Corporation v. *National Labor Relations Board*, 236 F. 2d 939	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 633

BOYD S. LEEDOM, *et al.*, Individually and as Chairman and Members of and Constituting The National Labor Relations Board,

Petitioners,

v.

WILLIAM KYNE, Individually and as President of Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, a Voluntary Unincorporated Labor Organization,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Court below (Pet., Appendix A, pp. 17-20) is not yet reported. The findings, conclusions and order of the District Court, also unreported, are set forth at R. 24-32.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

Whether a Federal District Court has jurisdiction to set aside a certification, issued by the National Labor Relations Board under Section 9 (c) of the National Labor Relations Act, as amended, upon suit brought by the labor organization receiving the certification where the Board admits that it acted without statutory authority in establishing the bargaining unit covered by the certification.

Statutes Involved.

All relevant statutory provisions are set forth in the Petition in Appendix B, pp. 22-26.

Statement.

A. The Board representation proceeding giving rise to this suit.

Following a representation proceeding instituted by a Petition filed on October 15, 1955 by respondent (hereinafter called Engineers Association), the Board issued its Decision and Direction of Election on May 28, 1956, finding appropriate a mixed unit of professional and non-professional employees at the Cheektowaga, New York plant of the Westinghouse Electric Corporation (R. 16-17, 27-28). The aforesaid bargaining unit comprised 233 employees in 10 engineering job categories who were found by the Board to be professional employees within the meaning of Section 2(12) of the Act, and 9 employees in 3 job categories who were found by the Board to be non-professional employees. Over the objections of Engineers Association (R. 13, 18, 28), the Board included the 9 non-professional employees in the same bargaining unit with the

professional employees without complying with Section 9(b)(1) which states:

> "Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; * * *"

The Board refused to conduct the separate election for the professional employees required by Section 9(b)(1)[1] on the ground that the non-professional employees in question shared a "close community of employment interest" with the professional engineers and on the further ground that the inclusion of the 9 non-professionals would not "destroy the predominantly professional character" of this unit for the professional engineering employees (R. 5, 14-16, 27).[2]

---

[1] The conduct of a 9 (b) (1) election differs from the usual representation election in that separate ballots are given the professional employees on which they are asked to indicate whether they favor inclusion in a unit with non-professional employees or wish to be represented in a separate unit. If a majority of professional employees vote in favor of inclusion in a unit with non-professional employees, their ballots are added to those of the non-professional employees in the tally of choice of bargaining representative. If the professional employees vote in favor of a separate unit, their ballots are segregated and separately tallied as to choice of bargaining representative. See *Westinghouse Electric Corporation*, 107 NLRB 16, 17-19; *Sonotone Corporation*, 90 NLRB 1236, 1240-42.

[2] In the Board's view, Congress intended when it wrote Section 9 (b) (1) solely to protect the professional employees from being engulfed by the inclusion of a superior number of non-professional employees in the same bargaining unit. Consequently, the Board argues, the inclusion of a minor number of non-professional employees in the same bargaining unit without regard to the statutory requirement that the professional employees affirmatively indicate by vote their wishes in the matter, cannot possibly impede the professional employees in the effective exercise of their collective bargaining rights (Pet., pp. 5-6, note 6). The Board's preoccupa-

On June 14, 1956, the usual election by secret ballot was conducted by the Board in a mixed unit. Professional employees were not afforded the opportunity to vote as to whether or not they desired to be commingled (R., pp. 6, 19, 29). In the election, a majority of the employees designated the Engineers Association as their collective bargaining representative (R., pp. 6, 21-22, 29).[3]

---

tion with legislative history to the exclusion of the plain terms of the statute reminds one of "the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood* v. *United States*, 350 U. S. 366, 374. Even assuming that the contemporary legislative history indicates Congressional concern for the circumstance where professional employees are outnumbered by non-professionals "the language used in the statute goes beyond this limited purpose". *National Labor Relations Board* v. *Lion Oil Co.*, 352 U. S. 282, 1 L. ed. 2d 331, 339.

The language of Section 9 (b) (1) makes no distinction between the ratio of professional to non-professional. Nor does it speak in terms of the "close community of employment interest" which non-professional employees may otherwise have with professional employees. The command of Section 9 (b) (1) is simple and unequivocal. It directs a separate election for professional employees in all circumstances in which the Board proposes to include them in the same bargaining unit with non-professional employees. The "obvious effect of the proviso [Section 9 (b) (1)] is merely a limitation of the Board's power to create a mixed unit." *Westinghouse Electric Corporation* v. *National Labor Relations Board*, 236 F. 2d 939, 943 (C. A. 3).

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[3] At note 5, pages 5-6 of its Petition the Board indicates that it has uniformly followed an administrative rule of "predominantly professional" in avoiding Section 9 (b) (1) elections since the inception of the amended Act. Suffice it to say that the instant case presents the first challenge to the Board's restrictive application of this section. Manifestly an erroneous disregard of a statutory provision does not become any the less erroneous with the mere passage of time. Moreover, the Board's reference to the statements of its construction of Section 9 (b) (1) before the Joint Committee on Labor-Management Relations, 80th Cong., 2d Sess., pp. 1147-1148, and in the 13th and 14th Annual Reports, do not, as the Board implies, signify Congressional approval of the Board's restrictive application of Section 9 (b) (1). Cf., *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365-366. Chairman Paul M. Herzog, in the very statement cited in the Board's Petition, recognized the Board's administrative practice of giving limited effect to Section 9 (b) (1) as less than "100% good law. I think it was more than 50% good law and extremely good administrative practice."

B. The Instant Suit.

On July 12, 1956, respondent commenced this suit in the district court for the purpose of compelling the Board to set aside the certification and to conduct a new election in accordance with Section 9(b)(1). The jurisdiction of the court was founded on 28 U. S. C. 1337 and Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009 (R. 2). The gravamen of the complaint was that the Board "exceeded the scope of [its] statutory authority" and "failed and refused to comply with Section 9(b)(1) of [the] Act," i.e., commingled professional and non-professional employees in the same bargaining unit without first affording the professional engineering employees a separate election to determine whether or not they desired to be included with the non-professional employees (R. 7-8).

On December 3, 1956, the district court granted respondent's cross-motion for summary judgment and denied the Board's motion (R. 23). The district court held that jurisdiction existed to entertain the merits of the complaint inasmuch as the Board exceeded its statutory authority when it failed to conduct the separate election for professional employees required by Section 9(b)(1). The court held further that the refusal of the Board to conduct the required election "works irreparable harm to the statutory right that an appropriate unit for collective bargaining purpose shall only include professional employees unless a majority of them vote for inclusion of non-professional employees within the unit" (R. 30-31).

In appealing to the court below the Board did not contest the district court's construction of Section 9(b)(1) (Pet. p. 9). The Board contended that the district court lacked original jurisdiction to grant equitable relief with respect to a representation determination even though such determination exceeded the Board's statutory authority. Such

relief, the Board argued, could be had only in the courts of appeal and only by way of review of a "final order" in an unfair labor practice proceeding based upon the representation determination (Pet. p. 9).

On September 16, 1957, the court below affirmed the decision of the district court, holding that this case did not involve "the wide area of determinations which depend upon the Board's expertise and discretion", but entailed "Board violation of a statutory requirement and resulting injury" (Pet., Appendix A, p. 19). Hence the court concluded that the representation determination could be reviewed by an original equity suit in the federal district court, particularly since "review by way of §10 is too remote and conjectural to be viewed as providing an adequate remedy" in this case (Pet., Appendix A, pp. 19-20).[4]

Argument.

1. The Court below was clearly correct in its holding that a Board representation determination arrived at in violation of an explicit statutory requirement may be reviewed by an independent equity suit in a federal district court where no other adequate remedy exists. This case, as the court below stated, presents "a different 'type of problem'." (Pet., Appendix A, p. 19). The broad discretion and

[4] The court rejected the Board's argument that Engineers' Association could have obtained review of the certification under the statutory review procedure by refusing to bargain with the Company except for a unit of only professional employees and so subject Engineers' Association to a charge that it had violated Section 8 (b) (3) of the Act. Since the Company was not aggrieved by the Board's certification providing for a mixed bargaining unit, the Company had no reason whatsoever to insist that the Engineers' Association bargain in the unit as certified. Absent a willingness of the Engineers' Association to bargain in the unit as certified, the employer "would then be free to deal with all employees individually" (Pet., Appendix A, pp. 19-20).

expertise which the Act permits the Board to enjoy under Section 9 (b) in determining an appropriate bargaining unit is plainly withdrawn by the 9 (b) (1) proviso with respect to a mixed unit of professional and non-professional employees.

In the instant proceeding the Board ignored the explicit limitation placed upon its discretion by Section 9 (b) (1) and acted outside the power given to it by Congress with the result that the professional employees suffered a deprivation of a statutorily created right. The court below was therefore called upon to prevent agency action in derogation of statutory authority rather than to enter upon an area reserved to agency discretion. The exercise of discretion in representation determination does not give the the Board the power to decline to comply with a limitation upon such discretion. "To do so would but grant to the Board the Congressional power of repeal." *Office Employees International Union* v. *National Labor Relations Board*, 353 U. S. ....., 1 L. ed. 2d 846, 851.

Thus this case satisfies the test of departure from statutory requirements with resulting injury which the Court in *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401 and *Inland Empire District Council* v. *Millis*, 325 U. S. 697 set forth as an essential requisite to the exercise of original jurisdiction in the federal district court.

The Board, however, contends that the jurisdictional issue remains undecided (Pet. pp. 10-11). Even assuming that the *Inland Empire* case once more reserved the question, the decision of the Court in *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145, removed the doubt. In that case (which the Board ignores in its Petition though cited by the court below in support of

its holding, Pet., Appendix A, p. 19, note 2), the Court affirmed the holding of the court below in *International Union of Mine, Mill and Smelter Workers* v. *Farmer,* 96 U. S. App. D. C. 416, 226 F. 2d 780, and *Farmer* v. *International Fur & Leather Workers Union,* 95 U. S. App. D. C. 308, 221 F. 2d 862, that the district court possessed original jurisdiction to enjoin the Board from acting without authority under Section 9 (h) of the Act in depriving a labor organization of its compliance status.

In the *Mine, Mill* case, as in the instant suit, a Board administrative determination was challenged by independent equity suit in the federal district court. In the *Mine, Mill* case, as in the instant suit, original jurisdiction was sought to be predicated on the ground that the Board action in question was in excess of statutory power. In the related and earlier *Farmer* v. *United Electrical Workers,* 93 U. S. App. D. C. 178, 211 F. 2d 36, cert. den., 347 U. S. 943, the court below expressly held that Board departure from statutory requirements with resulting injury fulfilled the condition necessary to assertion by the district court of original equity jurisdiction. In upholding the court below in the *Mine, Mill* case, the Court cited with approval the related decisions of the court below in the *United Electrical* and *International Fur & Leather Workers* cases. The court below, in turn, cited this Court's decision in the *Mine, Mill* case as well as its own decision in the *United Electrical Workers* case as authority for the proposition that agency action in excess of or in departure from statutory authority in an area sharply removed from discretion and expertise furnishes the showing necessary to the assertion of original jurisdiction in the federal district court (Pet., Appendix A, p. 19, note 2).

The Board argues that in *United Electrical Workers* the court below decided only that action "preliminary to any unfair labor practice or representation determination would provide the basis of direct review" (Pet., pp. 11-12, note 8). In the instant suit, the Board's argument continues, the action involves review of a particular representation determination as to which the Board enjoys complete immunity from direct review. This same argument was advanced by the Board in the court below without avail. As Judge Bazelon indicated in the Court's opinion, the "type of problem" presented in the instant case is no different from that presented in *United Electrical Workers* (Pet. p. 19, and note 2). In short, direct review is available in the face of Board departure from a statutory requirement regardless of the incidence of the departure in the administrative process. It is the exercise of unauthorized power by the Board, whether such exercise affects a determination of the bargaining unit under Section 9(b) of the Act or a determination of compliance under Section 9(h) which, the court below correctly decided, permits of direct judicial restraint.

2. The Board contends that under the decision of the court below all representation determinations are susceptible of direct review with horrendous effect upon the administration of the Act (Pet. p. 12, note 9, 15-16). The Board protests too much. As previously noted (*infra*, pp. 6-7), the court below carefully delineated the narrow area within which direct review of a Board representation determination could be said to be available in the district court. Only departure from the proscribed area of determining as appropriate a mixed bargaining unit of professional and non-professional employees without the necessary separate election may become the object of direct

judicial restraint. The essential areas of permissible exercise of statutory discretion under Section 9 (b), as distinguished from the limiting 9 (b)(1) proviso, remain judicially reviewable only in the mode provided in the statute.

Thus, in the instant suit, respondent does not challenge the Board's authority to determine the job categories that are professional under Section 2 (12) of the Act. Nor does respondent challenge the Board's authority to decide on a tentative or voting group basis that professional and non-professional employees may be included in the same bargaining unit. Rather is respondent's challenge concerned solely with the Board's refusal to be governed in the final determination of whether a mixed unit is appropriate by the wishes of the professional employees themselves as the statute commands.

For the Board to construe the holding below as leading to direct review of representation cases *en masse* is to ignore Judge Bazelon's caveat:

> "Equitable relief is clearly barred in the wide area of determinations which depend on the Board's expertise and discretion; as for example, in *Switchmen's Union* [320 U. S. 297] that railroad yardmen should be included in a unit with certain other smaller groups of railroad employees, or in *DePratter* [98 U. S. App. D. C. 74, 76, 232 F. 2d 74, 76], that full time production employees should be included in a unit with employees who devote only part time to production and the rest to other tasks" (Pet., Appendix A, pp. 18-19).

Since the area of extra-statutory judicial review is thus narrowly circumscribed, the holding of the court below leaves undisturbed the usual remedy of statutory judicial review with regard to the greatest proportion of the

Board's case load of representation cases. Nevertheless, the Board asserts that delay in the determination of bargaining representatives arising out of direct judicial review of action in excess of Board statutory authority must be avoided no less than in the case of direct judicial review of action within the Board's statutory authority (Pet. p. 19).

We do not understand the law to be that a power expressly removed by Congress may nevertheless continue to be exercised by the Board simply because delay in the ultimate completion of the representation proceeding would ensue upon an injured party's seeking equitable relief. As between the Congressional objective to avoid delay in representation proceedings, on the one hand, and the Congressional objective to curb the Board's exercise of discretionary authority in the particular area of representation determination explicitly delineated in Section 9 (b) (1), on the other, we believe the latter consideration must be regarded as paramount. Otherwise the professional employees would suffer a sacrifice or obliteration of a right Congress has created in their behalf were the Board, by an unauthorized action, to leave them completely without the unqualified right of self-determination of their own bargaining unit provided by the true reach of the Act. The decision of the court below, correctly viewed in the context of unlawful exercise of power, leaves unimpaired the Congressional objective to limit judicial review in the commonly encountered representation determination. Consequently, the instant suit fails to raise questions of importance in the administration of the Act.

3. The Board asserts that the decision in the instant case is contrary to the decisions of the courts of appeals of both the Second and the Fourth Circuits. The Board con-

strues the holdings in *Fitzgerald* v. *Douds*, 167 F. 2d 714, 716-717 (C. A. 2) and *Madden* v. *Brotherhood*, 147 F. 2d 439, 442-445 (C. A. 4) as standing for the proposition "that a Board representation determination may not be reviewed in a federal district court, not only where the exercise of Board discretion is at issue, but also where questions of the Board's legal power are involved" (Pet. p. 13).

Neither case cited by the Board presents a conflict with the decision of the court below for the reason that neither case involved action on the part of the Board admittedly in derogation of its statutory authority. Indeed, in *Madden* v. *Brotherhood, supra*, Judge Parker stated:

> "The case is not one where the action of the Board is without constitutional or statutory authority, as in *Colorado* v. *Toll*, 268 U. S. 228, upon which the Brotherhood relies. See our decision in *Ferris* v. *Wilbur*, 4 Cir., 27 F. 2d 262 and cases there cited for the distinction (*id.*, at 442)".

In *Fitzgerald* v. *Douds, supra*, the Second Circuit concluded that the plaintiff unions brought suit prematurely in that they were not adversely affected by Board action setting down the representation case for a hearing nor had the plaintiffs demonstrated that the holding of the hearing would cause irreparable injury. The court held that the Board had proceeded within rather than outside the authority given it by the statute.

Thus neither case advanced by the Board, in support of its contention that a conflict with the decisions of other courts of appeal exists, directly reaches the precise issue posed in the instant suit. Moreover, the question presented here has but narrow application in the administration of the Act.

Conclusion.

The decision below is correct and presents neither a substantial question warranting review nor a conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 19

BOYD S. LEEDOM, *et al.*, Individually and as Chairman and Members of and Constituting the NATIONAL LABOR RELATIONS BOARD, *Petitioners*,

v.

WILLIAM KYNE, Individually and as President of Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, a Voluntary Unincorporated Labor Organization, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA

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INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
QUESTION PRESENTED	2
STATEMENT	2
A. The Board representation proceeding giving rise to this suit	2
B. The instant suit	3
SUMMARY OF ARGUMENT	6
ARGUMENT	9
The equity powers of the District Court may be invoked to review Board action in excess of statutory authority	9
A. Inasmuch as the "type of problem" involves agency action outside statutory authority in deprivation of a statutorily created right direct judicial review is available	13
B. *Switchmen's* precludes direct review only of action committed to agency discretion	20
C. The legislative history of the Act fails to reveal that Congress intended unauthorized administrative power to exist uncurbed by direct judicial review	23
D. Having conceded in the court below that it erred in failing to apply Section 9(b)(1) the Board may not now by indirection contest the merits. Moreover the meaning of the *proviso* is plain that Congress intended unqualifiedly to limit the Board's unit finding authority with respect to professional employees	29
CONCLUSION	36

Citations.

Cases.

	PAGE
Air Line Dispatchers Association v. *National Mediation Board*, 189 F. 2d 689, certiorari denied, 342 U. S. 849	12, 22, 27
American Federation of Labor v. *National Labor Relations Board*, 308 U. S. 401	13
Anderson v. *Wilson*, 289 U. S. 20	29
Boeing Airplane Co., 86 N. L. R. B. 368	11
Colorado v. *Toll*, 268 U. S. 228	22
De Pratter v. *Farmer*, 232 F. 2d 74	5
Estep v. *United States*, 327 U. S. 114	26
Farmer v. *United Electrical, Radio & Machine Workers*, 211 F. 2d 36, certiorari denied, 347 U. S. 943	12, 15, 16
Federal Telecommunications Laboratories, Inc., 92 N. L. R. B. 1395	11
Ferris v. *Wilbur*, 27 F. 2d 262	22
Foreman & Clark, Inc. v. *National Labor Relations Board*, 215 F. 2d 293, certiorari denied, 348 U. S. 687	21
General Committee of Adjustment v. *Missouri-Kansas-Texas R. R. Co.*, 320 U. S. 323	21
General Committee of Adjustment v. *Southern Pacific Company*, 320 U. S. 338	21
Greenwood v. *United States*, 350 U. S. 366	30
Harmon v. *Brucker*, 355 U. S. 579	6, 15, 17, 18 19, 25, 26
Heikkila v. *Barber*, 345 U. S. 229	24
Inland Empire District Council v. *Millis*, 325 U. S. 697	13, 14
International Brotherhood of Electrical v. *Leedom*, U. S. D. C. (D. C.), Civil No. 3166-57 decided January 2, 1958	28

PAGE

International Union of Mine, Mill and Smelter Workers v. *Farmer*, 226 F. 2d 780 16

Leedom v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145 ..... 6, 12, 15

Madden v. *Brotherhood and Union of Tr. Employees*, 147 F. 2d 439 22

Miller Electric Co., 101 N. L. R. B. 1014 11

Millis v. *Inland Empire District Council*, 144 F. 2d 539 14

Mueller Brass Co. v. *National Labor Relations Board*, 180 F. 2d 402 21

National Labor Relations Board v. *Gullett Gin Co.*, 340 U. S. 361 8

National Labor Relations Board v. *Lion Oil Company*, 352 U. S. 282 30

National Maritime Union v. *McLeod*, U. S. D. C. (S. D. N. Y.), Civil No. 128-100, decided March 27, 1958 28

Office Employees International Union v. *National Labor Relations Board*, 353 U. S. 313 25

Packard Motor Car Co. v. *National Labor Relations Board*, 330 U. S. 485 21

Panama Canal Co. v. *Grace Line*, Nos. 251 & 252, October Term, 1957, decided April 28, 1958 ..... 6, 12, 18, 19, 25, 26

Philadelphia Co. v. *Stimson*, 223 U. S. 605 18

Potomac Electric Power Co., 99 N. L. R. B. 219 11

School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94 18

Schwarz Laboratories, Inc., 80 N. L. R. B. 930 11

Sonotone Corporation, 90 N. L. R. B. 1236 3

Sonzinsky v. *United States*, 300 U. S. 504 29

E. R. Squibb and Sons, 83 N. L. R. B. 792 11

Standard Oil Co., 107 N. L. R. B. 1524 11

Stark v. *Wickard*, 321 U. S. 288 ..... 24, 26

Switchmen's Union v. *National Mediation Board*, 320 U. S. 297 ..... 6, 9, 14, 15, 20, 21, 22, 23

PAGE

Westinghouse Electric Corporation, 107 N. L. R. B. 16 3

Westinghouse Electric Corporation v. *National Labor Relations Board*, 236 F. 2d 939 12

Westinghouse Electric Corp., Lamp Div., 80 N. L. R. B. 591 11

Westinghouse Electric Corp., South Philadelphia Works, 89 N. L. R. B. 8 11

STATUTES.

Administrative Procedure Act, Section 10 (60 Stat. 237, 5 U. S. C. 1009) 4, 27

Judicial Code:
28 U. S. C. 1337 4

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*):
Section 2 (12) 2
Section 8 (b)(3) 5
Section 9 (b) 2, 10, 21, 25
Section 9 (b)(1) 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 19, 21 26, 27, 28, 29, 30, 32, 33, 34, 35
Section 9 (d) 5, 24
Section 9 (h) 15
Section 10 (e) 5, 24
Section 10 (f) 5, 13, 24

Railway Labor Act:
Section 2, Fourth 20, 22
Section 2, Ninth 20, 22

MISCELLANEOUS.

Annual Reports of the National Labor Relations Board:
Seventeenth Annual Report, pp. 80-81 34

Dodd, *The Supreme Court and Organized Labor* 1941-1945, 58 Harv. L. Rev., 1018 15

PAGE

Hart & Wechsler, *Federal Courts and the Federal System* (Foundation, 1953) 23

67 Harv. L. Rev., 1084 27

71 Harv. L. Rev., 529-530 15

Hearings before the Senate Committee on Labor and Public Welfare on S. 55, 80th Cong., 1st sess., p. 1705 31

H. Rep. No. 245, 80th Cong., 1st sess., 43, 59-60, 1 Leg. Hist. of the Labor Management Relations Act, 1947, pp. 199-200, 334, 350-351 24

Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 428-430 23

Legislative History of the Administrative Procedure Act, Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 368 27

1 Leg. Hist. of the Labor Management Relations Act, 1947, p. 417 31

1 Leg. Hist., 1947, pp. 425, 431 32

1 Leg. Hist., 1947, p. 551 33

33 N. Y. Univ. L. Rev., 219 23

33 Notre Dame Lawyer, 301 23

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 633

BOYD S. LEEDOM, *et al.*, Individually and as Chairman and Members of and Constituting THE NATIONAL LABOR RELATIONS BOARD, Petitioners

v.

WILLIAM KYNE, Individually and as President of Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, a Voluntary Unincorporated Labor Organization, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA

Opinions Below

The opinion of the Court below (R. 37-39) is reported at 249 F. 2d 490. The findings, conclusions and order of the District Court, which are unreported, are set forth at R. 24-32.

Jurisdiction

The jurisdictional requisites are adequately set forth in the brief for petitioners.

Statutes Involved

All relevant statutory provisions are set forth in the brief for petitioners at Appendix, pp. 39-44.

Question Presented

Whether a Federal District Court has jurisdiction to set aside a certification, issued by the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, as amended, upon suit brought by the labor organization receiving the certification where the Board admits that it exceeded its statutory powers in establishing the bargaining unit covered by the certification.

Statement

A. The Board representation proceeding giving rise to this suit

Following a representation proceeding instituted by a petition filed on October 15, 1955 by respondent, Engineers Association, the Board issued its Decision and Direction of Election on May 28, 1956, finding appropriate a mixed unit of professional and non-professional employees at the Cheektowaga, New York plant of the Westinghouse Electric Corporation (R. 11-18). The aforesaid bargaining unit comprised 233 employees in 10 engineering job categories who were found by the Board to be professional employees within the meaning of Section 2(12) of the Act, and nine employees in three job categories who were found by the Board to be non-professional employees. Over the objections of Engineers Association (R. 13, 16, 18), the Board included the nine non-professional employees in the same bargaining unit with the professional employees without complying with Section 9(b)(1) which states:

> "Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such

> unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; * * *"

The Board refused to conduct the separate election for the professional employees required by Section 9(b)(1)[1] on the ground that the non-professional employees in question shared a "close community of employment interest" with the professional engineers and on the further ground that the inclusion of the nine non-professionals would not "destroy the predominantly professional character" of this unit for the professional engineers (R. 16).

On June 14, 1956, the usual election by secret ballot was conducted by the Board in a mixed unit. Professional employees were not afforded the opportunity to vote as to whether they desired to be commingled (R. 17-20). In the election, a majority of the employees designated the Engineers Association as their collective bargaining representative (R. 19-20).

B. The instant suit

On July 12, 1956, respondent commenced this suit in the United States District Court for the District of Columbia for the purpose of compelling the Board to set aside the certification and to conduct a new election in accordance with Section 9(b)(1). The jurisdiction of the court was

---

[1] The conduct of a 9(b)(1) election differs from the usual representation election in that separate ballots are given the professional employees on which they are asked to indicate whether they favor inclusion in a unit with non-professional employees or wish to be represented in a separate unit. If a majority of professional employees vote in favor of inclusion in a unit with non-professional employees, their ballots are added to those of the non-professional employees in the tally of choice of bargaining representative. If the professional employees vote in favor of a separate unit, their ballots are segregated and separately tallied as to choice of bargaining representative. See *Westinghouse Electric Corporation*, 107 N. L. R. B. 16, 17-19; *Sonotone Corporation*, 90 N. L. R. B. 1236, 1240-42.

founded on 28 U. S. C. 1337 and Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009 (R. 2). The gravamen of the complaint was that the Board "exceeded the scope of [its] statutory authority" and "failed and refused to comply with Section 9(b)(1) of [the] Act," i.e., commingled professional and non-professional employees in the same bargaining unit without first affording the professional employees a separate election to determine whether they desired to be included with the non-professional employees (R. 7-8).

On December 3, 1956, the district court granted respondent's cross-motion for summary judgment and denied the Board's motion (R. 23). The district court held that jurisdiction existed to entertain the merits of the complaint inasmuch as the Board exceeded its statutory authority when it failed to conduct the separate election for professional employees required by Section 9(b)(1). The court held further that the refusal of the Board to conduct the required election "works irreparable harm to the statutory right that an appropriate unit for collective bargaining purpose shall only include professional employees unless a majority of them vote for inclusion of non-professional employees within the unit" (R. 30-31).

In appealing to the court below the Board did not contest the district court's construction of Section 9(b)(1) (Board brief, pp. 8, 33-34). The Board contended that the district court lacked original jurisdiction to grant equitable relief with respect to a representation determination even though such determination exceeded the Board's statutory authority. Such relief, the Board argued, could be had only in the courts of appeal and only by way of review of a "final order" in an unfair labor practice proceeding based upon the representation determination.

On September 16, 1957, the court below affirmed the decision of the district court, holding that this case did not involve "the wide area of determinations which depend upon the Board's expertise and discretion", but entailed "Board violation of a statutory requirement and resulting injury" (R. 37-39). Hence the court concluded that the representation determination could be reviewed by original equity suit in the federal district court, particularly since "review by way of §10 is too remote and conjectural to be viewed as providing an adequate remedy" in this case (R. 39).[2]

---

[2] Respondent exhausted its administrative remedy for, in any meaningful appraisal of the mode of review of a certification under Section 9(d) and 10(e) or (f), an adequate remedy is not available. While the employer could literally file a charge of refusal to bargain in the unit certified against respondent under Section 8(b)(3) which might ultimately gain for respondent court review of the validity of the certification, the employer is most unlikely to do so. The employer is not aggrieved by the inclusion of the nine non-professionals in the bargaining unit. It has only to sit back and await a request to bargain in the unit as certified to avoid a charge of unfair labor practice. Absent such a request on the part of respondent the employer is free to deal with his employees on an individual basis. Hence the employer's position is such that neither legal sanction nor compulsion of the market place exist to induce it to initiate proceedings under the Act leading to court review.

Nor is it likely that the non-professionals would file unfair labor practice charges against respondent for failing to bargain on their behalf. In view of respondent's pronounced antipathy to the inclusion of these employees in the bargaining unit, the court below properly concluded that "They are hardly likely to insist upon placing their fate in the hands of a reluctant bargaining representative" (R. 39).

Under the Board's formulation respondent must stand idly by and sacrifice the bargaining interests of 233 professionals in the illusory hope that the advantaged employer or the unwanted non-professionals would seek to compel bargaining in the certified unit and thereby obtain for respondent judicial review of the Board's unlawful action. For respondent to be thus placed in the position of having to rely upon the mere fortuity of a Section 10(e) or (f) proceeding is hardly an adequate remedy. A statutory review procedure which is inadequate may not be termed compulsory. Consequently respondent's substantively adequate remedy against invasion of a statutory right lies in an original suit in equity.

Summary of Argument

A. Section 9(b)(1) of the Act is a mandatory limitation upon the Board's discretionary authority to establish an appropriate bargaining unit which would combine professional and non-professional employees. The Board is expressly forbidden by this *proviso* from determining that any unit other than a purely professional bargaining unit is appropriate unless the professional employees themselves indicate by a separate vote that they favor the inclusion of non-professional employees. Here the Board concedes that it committed error in sanctioning a mixed bargaining unit of professional and non-professional employees without having complied with the requirement of Section 9(b)(1). In failing to adhere to the requirement of the *proviso*, the Board deprived respondent of its statutorily created right to represent professional employees in a purely professional bargaining unit if they so chose.

Since the action in question exceeded the authority granted the Board under the Act to determine an appropriate bargaining unit, the district court correctly employed its equity powers to confine the Board to the area marked out for it by the statute. *Harmon* v. *Brucker*, 355 U. S. 579; *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145. The case presents the situation "where a statute creates a duty to act and an equity court is asked to compel the agency to take the prescribed action." *Panama Canal Co.* v. *Grace Line*, Nos. 251 and 252, October Term, 1957, decided April 28, 1958, at 9.

B. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, urged by the Board as precluding direct judicial review even of agency action in plain departure from the statute, is inapposite. In that case the Court held

that direct judicial review was unavailable because the agency action in question was within the authority granted the National Mediation Board under the Railway Labor Act to determine whether a system-wide or less than system-wide bargaining unit was appropriate. There, unlike the instant proceeding, the agency was not confronted with a statutory proviso such as Section 9(b)(1) prohibiting the very action in question. An analogous situation under the National Labor Relations Act to that presented in *Switchmen's* would be agency action under Section 9(b) which grants to the Board wide discretion in establishing an appropriate bargaining unit. Thus the "type of problem" involved in *Switchmen's*, i.e., "highly controversial • • • jurisdictional disputes", as to which Congress intended that agency word be final, bears no resemblance to the question of abuse of power presented in the case at bar.

C. The legislative history of the original and the amended Act manifests a congressional intent to preclude direct judicial review in the common representation determination arising under Section 9(b). However, there is no indication that Congress, in its desire to avoid delay in the commencement of the bargaining process attendant upon direct judicial review, went so far as to deny judicial relief in the case of Board action such as disregard of the mandatory 9(b)(1) limitation. It is inconceivable that Congress intended that the Board could at once refuse to be bound by an unqualified restraint upon its discretionary authority and at the same time escape judicial interdiction.

The Board's protestations that to permit judicial review of unauthorized agency action would put the agency at the mercy of objectors ignores the narrow area of unauthorized action in which review of a Board representation determination is available in a district court.

D. The Board concedes that in the court below it did not contest the correctness of the district court's finding that the Board failed to comply with the limitation upon its authority contained in Section 9(b)(1). Nevertheless, the Board now seeks to reactivate the merits by drawing a specious distinction between exceeding authority on the one hand, and exceeding authority exceedingly on the other. However, having conceded the merits in the court below, the Board is precluded from now raising any issue as to the validity of its construction of Section 9(b)(1).

Even assuming that the Board's construction of Section 9(b)(1) as requiring a separate election for professional employees only in circumstances where the professional employees are outnumbered by non-professional employees may properly be raised at this stage of the proceeding, the clear and unambiguous statutory language stands in the way of revision by administrative fiat. While the committee reports at times speak of the danger of a minority of professional employees being forced into bargaining units against their will "the language used in the statute goes beyond this limited purpose." *National Labor Relations Board* v. *Lion Oil Company*, 352 U. S. 282, 292.

Consistent with the underlying intent of Congress to enable the qualitatively distinct professional employees to maintain professional standards in collective bargaining, Section 9(b)(1) enacts an unlimited grant of freedom of choice of bargaining unit to professional employees whenever the Board proposes to commingle in the same bargaining unit employees of lesser attainments. In refusing to recognize this right, the Board acted without statutory warrant. In these circumstances the district court possessed jurisdiction to compel agency performance of a ministerial duty of a non-discretionary nature.

ARGUMENT.

The equity powers of the District Court may be invoked to review Board action in excess of statutory authority.

The respondent challenges the Board's representation determination in so far as the Board failed to comply with the limitation upon its unit finding authority as commanded by Section 9(b)(1) of the Act. The Board concedes that its disregard for the bounds of statutory authority constituted error (Board brief, pp. 8, 33-34). But, the Board asserts, it may fail to comply with a statutory requirement and escape interdiction by the equity powers of the district court since, save for constitutional issues, it has *carte blanche* to commit abuse of power in a representation determination (Board brief, p. 27). The Board draws much sustenance for its argument from *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297.

Switchmen's teaches that "the type of problem involved and the history of the statute in question become highly relevant" (320 U. S. at 301) in probing for the outer limits of the district court's jurisdiction. We turn preliminarily, therefore, to a delineation of the precise "type of problem involved" in the Board's erroneous action. If, as respondent maintains, the "type of problem" is definable within the framework of unauthorized exercise of power, then perforce the history of the statute takes on relevancy only in so far as it reveals that Congress intended that representation determinations be accorded a blanket immunity from extrastatutory review regardless of the nature of the agency action in question.

Section 9(b)(1) is the first of several limitations placed upon the Board's authority by the amended Act to establish an appropriate bargaining unit under Section 9(b). The limitation in express terms takes away from the Board and confers upon the professional employees themselves the right to determine whether the appropriate bargaining unit shall be confined to professionals or include non-professionals as well. The Board's sole discretion in this regard, preserved by Section 9(b), is to consider on a tentative or voting group basis whether a unit which combines professional and non-professional employees *may* be appropriate. At this point the Board's discretionary authority under Section 9(b) ceases and the limitation of the 9(b)(1) *proviso* takes hold.

Thus, in the absence of an affirmative vote by the professional employees alone in favor of a combined unit, the Board is flatly prohibited by the 9(b)(1) *proviso* from determining that a mixed unit of professional and non-professional employees *is* appropriate. The limitation is mandatory; it brooks of no exceptions. It affords neither opportunity for discretion nor room for construction.

Nevertheless, in the instant proceeding, having found five disputed job categories to be occupied by non-professional employees, the Board proceeded to combine three of these five categories (or a total of nine employees) in the same bargaining unit with the professional employees. The Board took this action despite the prohibition of the statute against inclusion of non-professionals with professionals "unless a majority of such professional employees vote for inclusion in such unit." The Board refused to conduct the statutory separate vote of professional employees substituting therefor its administrative judgment that the addition of the nine non-professional employees would not "destroy the predominantly professional character of

such unit."[3] This rule of "predominantly professional", engrafted upon Section 9(b)(1) as an exercise of administrative discretion, has served to deny to professional employees the statutory right to bargain collectively in units of their own choosing whenever the professionals outnumber the non-professionals.[4]

But the language of Section 9(b)(1) makes no distinction between the ratio of professional to non-professional employees nor does it speak in terms of a "close community of employment interest" which non-professional employees may otherwise have with professional employees.

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[3] The Board's decisions give no indication as to the ratio of professionals to non-professionals which suffices in its judgment to bring about the separate election for professionals where the bargaining unit is "predominantly professional". In *Federal Telecommunications Laboratories, Inc.*, 92 N. L. R. B. 1395, for example, the Board declined to conduct a 9 (b) (1) election even though the percentage of non-professional employees ran as high as 31 percent of the total number of employees in the bargaining unit as compared with approximately 4 percent in the instant representation proceeding.

Chairman Paul M. Herzog recognized the Board's administrative practice of giving only partial effect to Section 9 (b) (1) as less than "100 percent good law. I think it was more than 50 percent good law, and extremely good administrative practice. It seemed to us that the intent of Congress was to give professionals a chance to get out of nonprofessional units, and not to give a few nonprofessionals a chance to tangle things up for professionals. I think that was the basic reason for the decision." Hearings before the Joint Committee on Labor-Management Relations, 80th Cong., 2d Sess., pp. 1147-1148, June, 1948.

[4] In the following cases, the Board permitted the inclusion of non-professional employees in the percentages indicated without affording the professionals a separate vote to determine their desires as to inclusion with non-professionals: *Westinghouse Electric Corp., Lamp Div.*, 80 N. L. R. B. 591—22.2%; *E. R. Squibb and Sons*, 83 N. L. R. B. 792—11.1%; *Boeing Airplane Co.*, 86 N. L. R. B. 368—26.0%; *Westinghouse Electric Corp. South Philadelphia Works*, 89 N. L. R. B. 8—7.2%; *Schwarz Laboratories, Inc.*, 89 N. L. R. B. 930—29.1%; *Federal Telecommunications Laboratories, Inc., supra; Potomac Electric Co.*, 99 N. L. R. B.—17.5%; *Miller Electric Co.*, 101 N. L. R. B. 1014—7.5%; *Standard Oil Co.*, 107 N. L. R. B. 1524—7.0%.

Instead, Section 9(b)(1) mandates a separate election for professional employees in all circumstances in which the Board proposes to include such employees in the same bargaining unit with non-professionals. The "obvious effect of the proviso [Section 9(b)(1)] is merely a limitation on the Board's power to create a mixed unit." *Westinghouse Electric Corporation* v. *National Labor Relations Board*, 236 F. 2d 939, 943 (C. A. 3).

Clearly, therefore, the Court is not confronted here with Board error in the area of delegated expertise and discretion or in the area of conferred power of statutory construction.[5] Rather does the "type of problem involved" emerge as agency exercise of power whereof power there is none. The case presents the situation "where a statute creates a duty to act and an equity court is asked to compel the agency to take the prescribed action." *Panama Canal Co.* v. *Grace Line*, Nos. 251 and 252, October Term, 1957, decided April 28, 1958, at 9. It is the existence of a mandamus "type of problem" which, in the instant proceeding, permits of direct judicial review.

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[5] The court below was fully cognizant of the critical distinction between delegated discretion and unauthorized power. Judge Bazelon stated:

> "Equitable relief is clearly barred in the wide area of determinations which depend on the Board's expertise and discretion; as for example, in *Switchmen's Union*, that railroad yardmen should be included in a unit with certain other smaller groups of railroad employees, or, in *DePratter*, that full time production employees should be included in a unit with employees who devote only part time to production and the rest to other tasks. This case, however, presents 'a different "type of problem"'."[6]

[6] *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 89 U. S. App. D. C. 24, 27, 189 F. 2d 685, 688 (1951); see also *Farmer* v. *United Electrical, Radio & Machine Workers*, 93 U. S. App. D. C. 178, 211 F. 2d 36 (1953), cert. denied, 347 U. S. 943 (1954); *Leedom* v. *International Union*, 352 U. S. 145 (1956).

A. Inasmuch as the "type of problem" involves agency action outside statutory authority in deprivation of a statutorily created right direct judicial review is available

When first confronted in *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, with the question of the availability of judicial review through an original suit in equity, the Court there decided that the language of the statute and the relevant legislative history precluded review of a certification in a court of appeals as an "order" under Section 10(f) of the Wagner Act. The Court, however, left open for decision the distinct question of whether—

> "• • • the provisions of the Wagner Act, particularly Section 9 (d), have foreclosed review of its challenged action by independent suit in the district court • • • It can be appropriately answered only by a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy • • •" (308 U. S. at 412).

Clearly, therefore, the Court did not in *American Federation of Labor* v. *National Labor Relations Board* view the legislative history of the statute as foreclosing all possibility of extrastatutory judicial review save for constitutional issues.

In *Inland Empire District Council* v. *Millis*, 325 U. S. 697, the question of the availability of review of a Board representation determination arose this time by way of an original suit in equity in the district court. The ground for relief urged was that Section 9(c) of the Act as then written there required the Board to hold a pre-election rather than a post-election hearing. The Court examined the requirements of the statute and determined that the

Board acted within its delegated authority in conducting a post-election hearing. Again the Court did not accord conclusive effect to the legislative history of the Wagner Act as closing the door to equity jurisdiction save for constitutional issues. Instead, the Court in *Inland Empire*, reiterated the rule of unlawful action by way of departure from statutory requirements as a possible mode of direct judicial review of a representation determination.[6]

The Court's reluctance to foreclose equity jurisdiction on the premise that the language of the statute and the legislative history preserves only constitutional issues for direct judicial intervention assumes particular significance when it is noted that *Inland Empire* was decided sometime after the *Switchmen's* case. If *Switchmen's* possesses the compelling and definitive qualities attributed to it by the Board, it would have been a simple matter for the Court to have cited that case in the later *Inland Empire* case.[7] We suggest that in analyzing the statute in *Inland Empire* for the purpose of determining whether the Board possessed authority to hold a post-election rather than a pre-election hearing, the Court there applied in substance the unlawful departure from statute test of equity jurisdiction.[8]

The question whether given the necessary positive showing of Board action in plain departure from statutory

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[6] "That question should not be decided in the absence of some showing that the Board has acted unlawfully. Upon the facts presented, we think no such showing has been made, whether by way of departure from statutory requirements or from those of due process of law" (325 U. S. at 700).

[7] This is particularly so in view of the fact that the court below decided the jurisdictional question solely on the authority of the *Switchmen's* case. *Millis* v. *Inland Empire*, 144 F. 2d 539 (C. A. D. C.).

[8] "The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to

authority, judicial relief from this illegality would be forthcoming, was answered in the affirmative in *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145. In that case, the Court affirmed the holding of the court below[9] that the district court possessed original jurisdiction to enjoin the Board from acting without authority in depriving a labor organization of its compliance status under Section 9(h) of the Act.

In the *Mine Mill* case, as in the instant suit, Board action impaired a representation certification and the labor organization challenged the legality of the action by independent suit. There, as here, original jurisdiction was predicated on the ground that the "type of problem" created by the unlawful action came within the rubric of statutory power rather than administrative discretion. In the related non-compliance cases, *Farmer* v. *United Electrical, Radio &*

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determine whether the respondent did exceed his powers." *Harmon* v. *Brucker*, 355 U. S. 579.

"The question whether the statutory scheme of review is exclusive was first presented to the Court in *Inland Empire Dist. Council* v. *Millis*.* In that case a defeated union filed a bill in equity charging that the certification procedure followed by the Board violated the requirements of both the statute and due process. The Court ruled that it would be inappropriate to decide the question of reviewability 'in the absence of some showing that the Board has acted unlawfully,' and that 'upon the facts presented . . . no such showing has been made. . . .'** But clearly some form of review was afforded since the Court determined that the bill was not justified on the merits, thereby legitimatizing the N. L. R. B. procedure followed in that case.***" *NLRB's Discretionary Jurisdiction*, 71 Harv. L. Rev. 529-530.

* 325 U. S. 697 (1945); cf. *Switchmen's Union* v. *National Mediation Bd.*, 320 U. S. 297 (1943).

** 325 U. S. at 700.

*** See Dodd, *The Supreme Court and Organized Labor, 1941-1945*, 58 Harv. L. Rev. 1018, 1041-42 (1945).

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[9] *International Union of Mine, Mill and Smelter Workers* v. *Farmer*, 226 F. 2d 780 (C. A. D. C.)

Machine Workers, 211 F. 2d 36 (C. A. D. C.), certiorari denied, 347 U. S. 943 and *Farmer* v. *International Fur & Leather Workers Union*, 221 F. 2d 862 (C. A. D. C.) where the same "type of problem" existed, the court below enunciated and applied the principle that Board action in excess of statutory authority with resulting injury justifies direct judicial relief. In *Mine Mill*, the Court adopted the principle of *United Electrical* and *Fur & Leather Workers* and concluded that in undertaking to police non-Communist affidavits the Board proceeded without warrant in law. Clearly, therefore, the instant proceeding comes within the holding of the related non-compliance cases.[10]

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[10] The Board would distinguish the *Mine Mill* case, on the ground that the jurisdictional argument was not urged before this Court though advanced in the district court (Board brief, pp. 32-33, n. 22). It is apparent, however, that inherent in this Court's determination in *Mine Mill* that the Board acted without authority was the preliminary and necessary determination that jurisdiction existed in the district court to pass upon the merits. Certainly the question of jurisdiction remained before this Court quite independently of whether the Board withdrew that issue for it is axiomatic that a party may neither confer nor deny jurisdiction over the subject matter of a proceeding. The Board's further contention that neither *Mine Mill* nor *United Electrical* involved the considerations of delay in the ultimate determination of bargaining representatives which led Congress to preclude direct review of a Board representation determination, is equally without merit (Board brief, pp. 32-33, n. 22). In the analogous *United Electrical* case the Board argued in the court below that its actions in attempting to police non-Communist affidavits could not be directly reviewed because of Congress' desire to prevent delay in the administrative process culminating in certification of bargaining representatives. Thus, the Board stated (see Board brief No. 11727, *Herzog et al. v. United Electrical et al.*, in the court below, April 1953, pp. 19-20):

> "Similarly, it has repeatedly been held that the courts are without power to review any phase of a representation proceeding except as, under Section 9 (d) of the Act, that proceeding becomes the basis for a final order in an unfair labor practice proceeding." [Citations omitted.]
>
> "Judicial review of representation and unfair labor practice proceedings being precluded, therefore, except where such proceedings have ripened into a 'final order,' *a fortiori*, Board action preliminary to such proceedings [i.e., involving the non-Communist affidavit filing requirement of Section 9 (h)]

The principle applicable herein that agency action in excess of statutory authority with resultant judicially cognizant injury permits of direct review is set forth in *Harmon* v. *Brucker*, 355 U. S. 579. There the Secretary of the Army issued discharge certificates in form other than "honorable" and petitioners brought proceedings in the district court seeking nullification of those actions. The question before the Court was whether the actions of the Secretary of the Army, allegedly in excess of his statutory powers, afforded the district court original jurisdiction. The underlying statute provided for an Army Review Board with power to review the type of discharge issued and prescribed that "the findings thereof [shall] be final subject only to review by the Secretary of the Army". Hence, the Government argued, "such administrative procedure is exclusive and the courts are without jurisdiction to review those findings" (*ibid.*).

Holding that the district court possessed jurisdiction over the proceedings, the Court said in *Harmon* (*ibid.*):

> "Generally, judicial relief is available to one who has been injured by an act of a government official

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is not subject to judicial review. The sole exception to the exclusive method of review prescribed by the Act arises where an aggrieved labor organization, which does not otherwise have available to it any form of judicial review, challenges Board action on the basis of a substantial constitutional claim.

* The conclusion above stated is confirmed and fortified by the legislative history of the Act which demonstrates that Congress rejected proposals to permit direct review of representation cases on the ground that the delays involved would frustrate the basic policy of the Act to promote collective bargaining." [Citations omitted.]

But the court below regarded the argument of delay as providing no justification for refusing judicial relief in circumstances of agency action outside statutory bounds. It cannot be said, therefore, that the instant proceeding does not involve the same factors as were present in *Mine Mill* and the analogous *United Electrical* case and there thought not to militate against direct review of a Board representation determination.

which is in excess of his express or implied powers. *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 621-622; *Stark* v. *Wickard*, 321 U. S. 288, 310. The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available."

The Court then proceeded to consider on the merits whether the Secretary of the Army exceeded his power under the applicable statutes by taking into account pre-induction activities of petitioners in determining the type of discharges to be issued to them upon separation from the Army. Upon analysis of the statutes the Court found no warrant for the power assumed by the Secretary of War.

The *Harmon* case is precisely in point. There, as here, the administrative action in question presents an identical "type of problem". In that case the unlawful less than honorable discharge certificate was based upon findings in an area beyond the ambit of the statute. In the instant proceeding the unlawful certificate of bargaining representatives was based upon findings in an area removed by statute from administrative determination. Here, no less than in *Harmon*, the challenge to agency action rests not upon interference with official discretion but rather "upon the charge of abusive power and its merits must be determined accordingly • • •". *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 621-622.

That *Harmon* governs the case at bar is made abundantly clear in the related and distinguishing *Panama Canal Co.* v. *Grace Line*, Nos. 251 and 252, October Term,

1957, decided April 28, 1958. There suit was brought in the district court by steamship companies to compel the *Panama Canal Co.*, an agent of the President, to readjust the tolls of the Panama Canal. The underlying statute authorized the *Panama Canal Co.* to prescribe tolls and to change them. In deciding that the district court lacked jurisdiction to compel the *Panama Canal Co.* to fix new tolls, the Court drew the line between questions requiring the exercise of an informed agency discretion and questions requiring agency performance of a ministerial act. The question of costs to be included in the toll making procedure for the Panama Canal "involve nice issues of judgment and choice * * * left to the expertise of the agency burdened with the responsibility for decision" (id., at 8-9). In contradistinction the matter in *Harmon* permits of judicial relief since it "is peradventure clear * * * the agency is clearly derelict in failing to act * * * the inaction or action turns on a mistake of law * * *" (id., at 9).

So, too, in the instant proceeding, the unequivocal purpose of Section 9(b)(1) is to remove from agency authority any discretion to mix in the same bargaining unit professionals and non-professionals without performance of the ministerial act of ascertaining the desires of the professionals. Unlike the agency responsibility existent in *Panama Canal*, it cannot be said that in the instant case "the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms" or that "the very construction of the statute is a distinct and profound exercise of discretion" (id., at 9). Rather does the instant case fit the type of situation "where ministerial duties of a non-discretionary nature are involved" (id., at 9). Consequently, we submit, judicial relief is appropriate.

Nevertheless, the Board places great reliance upon *Switchmen's, supra,* as standing for the proposition that an administrative body may transcend statutory limits without subjecting itself to direct judicial review save only in so far as substantial constitutional issues may be involved. We shall demonstrate, however, that to cry *Switchmen's* is not to cry shibboleth.

B. *Switchmen's* precludes direct review only of action committed to agency discretion

Construed in the light of the precise issue there posed, *Switchmen's* precludes direct review only of a claim of erroneous findings in an area where the administrative agency has statutory authority to act. In that case, the question was as to the authority of the Mediation Board to settle a dispute under Section 2, Ninth and Fourth of the Railway Labor Act by a determination that a system-wide bargaining unit rather than a lesser or divisional bargaining unit was appropriate. The Mediation Board had certified the Brotherhood of Railway Trainmen as representative for all yardmen after a system-wide election in the New York Central Railroad. The Switchmen's Union contended that in certain divisions of the system separate votes should have been taken of the yardmen and for this reason sought cancellation of the certificate issued to the rival labor organization.

The Court referred to the "type of problem involved" as "highly controversial • • • jurisdictional disputes • • •" *Switchmen's, supra,* at 302-303. The legislative history of the statute, the Court pointed out, revealed that Congress did not intend to implicate the judiciary in the handling of this "explosive problem" (*id.*, at 303). Instead, Congress gave to the Mediation Board the authority "in election disputes to interpret the meaning of 'craft' as used in the statute" with finality (*id.*, at 305).

Quite clearly, therefore, interpretation of the meaning of the terms "craft" or "class" constituted the "type of problem" involved in *Switchmen's* which the Court held to be immune from direct judicial review. An analogous "type of problem" would be that involved in the usual determination of an appropriate bargaining unit which the Board is broadly empowered to make under Section 9(b) of the Act with comparable immunity.[11] *Mueller Brass Co.* v. *N. L. R. B.*, 180 F. 2d 402, 404-405 (C. A. D. C.); *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, 491; *Foreman & Clark, Inc.* v. *National Labor Relations Board*, 215 F. 2d 293 (C. A. 9), certiorari denied, 348 U. S. 687.

The analogy ceases, however, in the face of the type of administrative determination called for by the statutory *proviso* here in issue. The Board is flatly prohibited by Section 9(b)(1) from certifying a mixed unit of professional and non-professional employees, "unless a majority of such professional employees vote for inclusion in such unit." Departure from the plain limitation of the *proviso* cannot be justified either as an exercise of delegated administrative discretion or of vested power of statutory construction. The Board's mandatory duty in the proceeding at bar was simply to conduct the requisite election and to certify the kind of bargaining unit dictated by the results. The *proviso* permits of no other course.

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[11] The question in *Switchmen's* as well as in most Board representation determinations falls in the category of "a jurisdictional controversy between two unions. It raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins." *General Committee of Adjustment* v. *Southern Pacific Company*, 320 U. S. 338, 343; *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. R. Co.*, 320 U. S. 323.

Switchmen's, on the other hand, concerned statutory provisions which granted to rather than withheld authority from the agency to determine an appropriate unit. There the agency acted with statutory sanction whether the construction of Section 2, Ninth and Fourth of the Railway Labor Act by the Mediation Board be regarded as entailing an exercise in administrative discretion or an exercise in the application of a statutorily conferred power. Obviously, if the Railway Labor Act had expressly declared that certifications could be made only in separate divisions of a railroad system the "type of problem" the Court had before it in the *Switchmen's* case would have been entirely different, for it is the traditional function of a reviewing court to see to it that administrative authority is exercised within express statutory limitations.

The Court of Appeals for the Fourth Circuit, in denying direct review in *Madden* v. *Brotherhood and Union of Tr. Employees*, 147 F. 2d 439, on the authority of the *Switchmen's* case, adverted to the distinction between non-reviewable agency action founded in statutory authority and reviewable agency action lacking in statutory foundation. Judge Parker said:

> "The case is not one where the action of the Board is without constitutional or statutory authority, as in *Colorado* v. *Toll*, 268 U. S. 228, upon which the Brotherhood relies. See our decision in *Ferris* v. *Wilbur*, 4 Cir., 27 F. 2d 262 and cases there cited for the distinction" (*id.*, at 442).

Similarly, the Court below in *Air Line Dispatchers Association* v. *National Mediation Board*, 189 F. 2d 685, certiorari denied, 342 U. S. 849, rejected the contention of the Mediation Board that *Switchmen's* foreclosed original review of extrastatutory administrative action, stating (*id.*, at 688):

> "In each of these cases [*Switchmen's* and a series of related cases], the Board had chosen between alternate methods of settling a dispute over representation under Section 2, Ninth, of the Act. *The question was not as to the power of the Board to resolve the dispute but whether it had done so in an erroneous manner.*" (Emphasis added.)

We submit, *Switchmen's*, correctly viewed, presents no bar to original jurisdiction in the instant proceeding.[12]

C. The legislative history of the Act fails to reveal that Congress intended unauthorized administrative power to exist uncurbed by direct judicial review

The Board argues that its action herein, though without statutory authority, was intended by Congress to remain outside direct judicial review because of delay in the collective bargaining process inherent in such review. In the circumstances of this case, the Board's argument would compel the conclusion that having written into the amended Act a limitation upon the Board's powers to determine an appropriate unit, the Congress nevertheless intended in its desire to avoid "dilatory tactics" that the Board could with impunity disregard this limitation (Board brief, pp. 24-25).

We think the Board claims too much for in the absence of a specifically manifested intent on the part of the Congress to exclude judicial review in circumstances where, as here, the action in question is in derogation of statutory

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[12] We are cautioned by the Court in *Switchmen's* that "generalizations as to when judicial review of administrative actions may or may not be obtained are, of course, hazardous." 320 U. S. at 301. For a critical evaluation of the Court's opinion in *Switchmen's* see Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401, 428-430; Hart and Wechsler, *The Federal Courts and the Federal System* (The Foundation Press, 1953), p. 327. See, also, 33 N. Y. Univ. L. Rev. 219; 33 Notre Dame Lawyer 301.

authority, the courts retain the responsibility of determining the limits of statutory grants of authority. As the Court stated in *Stark* v. *Wickard*, 321 U. S. 288, 310:

> "The responsibility of determining the limits of statutory grants of authority • • • is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. • • • [U]nder Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."

The Board's recital of Section 9(d) and 10(e) and (f)[13] as well as the legislative history of both the original and amended Acts nowhere manifests that the concern of Congress to avoid "dilatory tactics" in frustration of the Act's basic policy of promoting collective bargaining reached the point of exonerating agency abuse of power. Having written into the Act a *proviso* compelling the Board to defer to the wishes of professional employees in the matter of including non-professional employees in the same bargaining unit, it is inconceivable that Congress would regard resort to direct judicial relief against the failure of the Board to observe the *proviso* as "dilatory tactics."

Section 10(f) of the 1947 House Amendments to the Act provided for direct review by the courts of appeal of Board certifications in the same manner as from a final order of the Board (H. Rep. No. 245, 80th Cong., 1st sess., 43, 59-60, 1 Legislative History of the Labor Management Relations Act, 1947 (G. P. O., 1948), pp. 199-200, 334, 350-351). Had

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[13] "Mere failure to provide for judicial intervention [in the statute] is not conclusive; neither is the presence of language which appears to bar it." *Heikkila* v. *Barber*, 345 U. S. 229, 233.

this amendment been accepted, it would have meant that the courts of appeal of the various circuits would have been under a duty to decide not only whether a certification departed from statutory requirements, but also whether the underlying findings on which the certification was based, are supported by substantial evidence. Conceivably such broad statutory review in representation cases could have led to "dilatory tactics", and it was to the specific problem of direct review of discretionary determinations under Section 9(b) that Senator Taft was addressing himself in the statement quoted in the Board's brief (pp. 21-22). There is absent any manifestation that the opponents of direct review of Board certifications desired to go so far as to seal off the long standing equity powers of the district court in the particular circumstances here presented of agency action in excess of statutory authority. "To do so would but grant to the Board the Congressional power of repeal." *Office Employees International Union* v. *National Labor Relations Board*, 353 U. S. 313, 320.

In *Harmon, supra*, the underlying statute expressed an intent on the part of Congress to bar court review of the administrative determination there involved. Justice Clarke in his dissenting opinion, viewed "this legislative expression of finality * * * in context with the uninterrupted history of Congressional review, culminated by Congress' transfer of the review function to administrative bodies * * *" as negating the implied conclusion of the majority that Congress intended to permit judicial review.

But, as we read *Harmon* and the later *Panama Canal* case, the majority declared that agency determinations which go beyond the powers granted by Congress are a nullity, *i.e.*, without binding effect and hence not valid determinations at all. Therefore, in affording judicial review against agency unlawful assumption of power, the

underlying intent of Congress to attach finality[14] to "distinct and profound exercise of discretion" (*Panama Canal Co., supra,* at 9) fairly within agency authority remains undisturbed. The Court expressed itself in this regard in *Stark* v. *Wickard, supra,* at 309-310:

> "When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers."

In the absence of evidence that Congress explicitly limited the Board's discretion in Section 9(b)(1) with the intention that the Board itself determine with finality when it would choose to observe that limitation upon its powers, the courts have the duty to compel agency adherence to the statute as written. In a matter so fundamental as the orderly distribution of authority between legislature, courts and administrative agency, it cannot be left to mere inference that Congress meant to relegate enforcement of respondent's statutory right to the vagaries of the Board's sense of abnegation.

The Board further contends that direct review of representation determinations in substantial departure from the statute would invite a sea of cases before the district courts with horrendous effect upon the administration of the Act (Board brief, pp. 25-26). The Board protests too much. In *Stark* v. *Wickard, supra,* the Court was

[14] In *Harmon,* the court in effect interpreted "final" to mean final, if not contrary to granted authority. *Estep* v. *United States,* 327 U. S. 114.

similarly confronted with a contention that judicial review of unauthorized agency action "puts the agency at the mercy of objectors." In rejecting this contention, the Court indicated that judicial review did not extend to "• • • matters of administrative discretion as to which there is no justiciable right or are clearly authorized by a valid Act" (*id.*, at 310-311).

As previously noted (*supra*, p. 12), the court below carefully delineated the narrow area in which direct review of a Board representation determination is available in a district court.[15] Only departure from the proscribed area of determining as appropriate a mixed bargaining unit of professional and non-professional employees without the necessary separate election may become the object of direct judicial restraint. The area of delegated exercise of discretion under Section 9(b) essential to the administrative process, as distinguished from the mandatory limitation of the 9(b)(1) *proviso*, remains judicially reviewable only in the mode provided in the Act.

It is hardly a valid objection to direct judicial review that the district courts may hereafter with increased fre-

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[15] The denial of the right of respondent under the several interdependent provisions of Section 9 of the Act to represent professional employees in a separate bargaining unit presents a legal wrong independently justiciable under Section 10 of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1009). Section 10 is expressly made inapplicable to "(1) statutes [which] preclude judicial review or (2) agency action [which] is by law committed to agency discretion." With regard to the first ground for preclusion there must exist a legislative intent "clearly, convincing and unmistakable" to forbid such review (Legislative History of the Administrative Procedure Act, Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 368). That intent, we maintain, in the circumstances of this case, is neither explicit in the Act nor indicated in its history. Since the agency action in question falls outside of agency discretion, the provisions of Section 10 of the Administrative Procedure Act for court review take hold. Cf. *Air Line Dispatchers Association* v. *National Mediation Board*, *supra*, at 689; 67 Harv. L. Rev. 1084.

quency be asked to review a Board representation determination on a complaint which alleges excess of statutory authority simply because such jurisdictional ground is available (Board brief, pp. 25-26). If respondent is correct in its view of the applicable law, it cannot be denied judicial relief merely because others may hereafter utilize the same ground in attempting to invoke direct review.[16] Moreover, to assign respondent to political means for realization of its statutory right (Board brief, p. 23, n. 13), makes a mockery of the constitutional scheme of confining an administrative agency through judicial intervention to the area chartered for it by the legislature.

In sum, between the congressional objective to avoid delay in representation proceedings and the congressional objective to curb the Board's exercise of discretionary authority in a particular area of representation determination explicitly delineated in Section 9(b)(1), we believe the latter consideration must be regarded as paramount. Otherwise the professional employees would suffer a sacrifice or an obliteration of a right Congress has created in their behalf were the Board, by an unauthorized action, to leave them completely without the unqualified right of self-determination of their own bargaining unit provided by the true reach of the Act.

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[16] See, for example, *National Maritime Union* v. *McLeod*, U. S. D. C. (S. D. N. Y.), Civil No. 128-100, decided March 27, 1958; *International Brotherhood of Electrical Workers* v. *Leedom*, U. S. D. C. (DC), Civil No. 3166-57, decided January 2, 1958 (since the decision of the court below) and denying direct review.

D. Having conceded in the court below that it erred in failing to apply Section 9(b)(1) the Board may not now by indirection contest the merits. Moreover, the meaning of the *proviso* is plain that Congress intended unqualifiedly to limit the Board's unit finding authority with respect to professional employees.

The Board concedes that in the court of appeals it did not contest the district court's rejection of the Board's interpretation of Section 9(b)(1) "but chose to stand on its jurisdictional objections." The Board nevertheless proceeds to argue that its "interpretation of Section 9(b)(1) has a rational basis * * *" It does so for the stated reason that the Court may conclude that arbitrary disregard of statutory authority provides "special reasons for implying the availability of a review procedure not otherwise open" (Board brief, pp. 33-34).

The distinction drawn by the Board between rational and irrational abuse of power is not an appealing one. In either case statutory authority for the action taken is nonexistent. Even the most compelling reasons will not justify plain departure from the statute for the Board has only to conform to the discipline of the judicial function no less binding upon administrative agencies than upon the courts. Succinctly expressed by Justice Cardozo in *Anderson* v. *Wilson*, 289 U. S. 20, 27:

"We take this statute as we find it."

Having conceded the merits in the court below, the Board is precluded from now raising any issue as to the validity of its construction of Section 9(b)(1). *Sonzinsky* v. *United States*, 300 U. S. 504, 514. Nevertheless, the Board indulges in a back-door effort to reactivate the merits in the guise of a specious dichotomy between exceeding authority on the one hand, and exceeding authority exceedingly on the other. Without in any way acceding

to the Board's attempt to reintroduce the issue on the merits, it is clear that the Board's failure to be governed by the limitation of Section 9(b)(1) while at the same time certifying a "predominantly professional" bargaining unit, violated the *proviso*.

Dismissing the language of the proviso as "literally" requiring a separate election for professional employees whenever it is proposed to include them in the same bargaining unit with non-professional employees, the Board discounts the primary canon of statutory interpretation that when the statutory language is clear and unambiguous on its face, the statute must be applied as written. Instead, the Board places exclusive reliance upon the legislative history of Section 9(b)(1) in a manner which brings to mind "the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute". *Greenwood* v. *United States*, 350 U. S. 366, 374.

Whatever comfort the Board may derive from the committee reports on Section 9(b)(1) as evidencing a legislative interest to assure self-determination of bargaining units to professional employees in circumstances where they are outnumbered by non-professional employees "the language used in the statute goes beyond this limited purpose." *National Labor Relations Board* v. *Lion Oil Company*, 352 U. S. 282, 292. Indeed the unambiguous language of the *proviso* provides ample indication that Congress intended to assure to professional employees the right of self-determination of their bargaining unit in every possible circumstance where the Board would intrude a non-professional group. This is so because in enacting Section 9(b)(1) and the companion Section 2(12) defining a professional employee, Congress sought to remedy in its entirety the basic mischief of forced commingling of professional and non-professional employees.

The unreserved terms Congress employed in granting professional employees the right to choose their own bargaining unit resulted from careful consideration of the special problems that distinguish professionals from others. The spokesman for the professional engineering societies protested against compulsory commingling of professionals and non-professionals in the same bargaining unit, stating:

> "The background, education, training and work interest of professional employees and non-professional employees are inherently divergent. It is futile to expect that a forced grouping of the professional and nonprofessional employees in any plant or organization could possibly form an appropriate bargaining unit. Under present law and its administration, such plainly inappropriate groupings are made and, by fiat, are declared appropriate. We do not consider this to have been the intent of Congress * * *" (Hearings before the Senate Committee on Labor and Public Welfare on S. 55, 80th Cong., 1st sess., p. 1705).

The Senate Report reflected these protests by noting that:

> "Although there has been a trend in recent years for manufacturing corporations to employ many professional persons, including architects, engineers, scientists, lawyers and nurses, no corresponding recognition was given by Congress to their special problems. *Nevertheless, such employees have a great community of interest in maintaining certain professional standards* * * *" (1 Legislative History of the Labor Management Relations Act, 1947, p. 417; emphasis supplied).

While the House and Senate Reports refer to the danger of a minority of professional employees being forced into bargaining units against their will (Board brief, pp. 34-36), it is of paramount significance that Congress did not so

circumscribe the right of self-determination of bargaining units accorded professional employees in the statutory language it adopted. Instead Congress enacted a broad grant of freedom of choice to professionals consistent with the fundamental legislative objective of maintaining professional standards through collective bargaining in units undiluted by individuals of lesser attainments.

The method selected by Congress to secure the objective of maintaining professional standards was to require the Board uniformly to defer to the judgment of the very professionals whose unique interests would be at stake. They, alone, not the Board were to determine by separate vote whether their professional standards would be placed in jeopardy by the inclusion of disparate groups in the same bargaining unit. Thus, the Senate Report (1 Leg. Hist., p. 431) states:

> "Section 9(b): The several amendments to this subsection propose to limit the Board's discretion in determining the kind of unit appropriate for collective bargaining:
>
> (1) The Board is prohibited from including professional employees in units with other employees unless they first vote in favor of such inclusion * * *"

Again, the Senate Report (1 Leg. Hist. p. 425) refers to the relationship between the definition of "professional employees" in Section 2(12) and the requirement of "separate voting units of professional employees" in Section 9(b)(1):

> "(12) 'Professional employees': The significance of this amendment appears in Section 9 which is amended by the committee bill to require separate voting units of professional employees. Here again the Committee was careful in framing a definition to cover only strictly professional employees such

as, engineers, chemists, scientists, architects and nurses."

In similar vein, the House Conference Report states (1 Leg. Hist. p. 551; H. Conf. Rept. No. 510, 80th Cong. 1st sess. p. 47):

> "The conference agreement, in Section 9(c)(2), covers in specific terms [the matter of crafts and] professional employees * * *. In the case of the latter the Board cannot include both professional employees and employees who are not professional employees in the same unit, unless a majority of the professional employees vote for inclusion therein."

It is said by the Board that a separate election for professional employees in the circumstances of this case "would serve only to enable professional employees to deprive other employees with a close community of employment interests—e.g., the 9 non-professionals in the unit here . . . of the most suitable means of exercising their collective bargaining rights" (Board brief, p. 36). The short answer is, of course, that in enacting Section 9(b)(1) Congress endeavored to protect the distinctive collective bargaining interests of professional employees in the maintenance of professional standards. Clearly Congress considered that the interests of non-professionals were adequately protected under the Act and required no corrective legislative measures. For the Board to now insist that professional employees are to be denied the right to undiluted bargaining units on the specious ground that non-professionals might otherwise remain outside a bargaining unit limited to professional employees, is to revert to the very evil of mixed bargaining units Congress sought to expunge. The fallacy of the Board's approach lies in a persistent refusal to recognize that the standard employed

by the Act with regard to units of professional employees is qualitative rather than quantitative.[17]

Furthermore the fears expressed by the Board as to the plight of the small group of non-professionals are entirely unwarranted. Thus, in the case at bar, had the professional employees been permitted a separate election and had they voted in favor of a separate unit, the non-professional employees would then constitute a unit by themselves. In the latter event the non-professional employees would comprise a category known in Board parlance as "technical employees". As such they would possess distinctive bargaining interests commonly associated with "technical employees" in no way impaired by the fact that these non-professionals or "technical employees" would be few in number.[18]

---

[17] The Board points to the fact that the vote of the nine non-professionals did not affect the results of the election and concludes therefrom that the views of the overwhelming majority of professional employees were fully reflected despite the absence of a separate election (Board brief, p. 36). Aside from the basic consideration adverted to above that Congress did not posit the right of professional employees to self-determination of their own bargaining unit upon a game of numbers, the failure of the Board to conduct a 9(b)(1) election in circumstances of a "predominantly professional" bargaining unit enables a minority of non-professional employees to combine with a minority of professional employees to frustrate the choice of a bargaining representative which a voting group confined to purely professional employees might otherwise produce. Moreover, the thrust of the *proviso* is in the area of choice of bargaining unit as distinguished from choice of bargaining representative. By denying to the professional employees herein the separate choice of bargaining unit, the Board directly nullified the statute regardless of the outcome of the election as to choice of bargaining representative.

[18] "Technical employees" are regarded by the Board as constituting an appropriate unit because of their own distinctive interests. In the Board's *Seventeenth Annual Report* (1952) Board policy with regard to "technical employees" is set forth in part as follows:

> "Technical employees usually are placed in separate units unless one of the interested parties objects to the establishment of such a unit. The reason for grouping technical employees separately is that ordinarily their duties and interests differ substantially from those of other employees in the same plant." (pp. 80-81; case citations omitted)

To adopt the Board's view as to legislative intent would truly allow the tail to wag the dog by depriving professional employees of the "fullest freedom in exercising the rights guaranteed" by the Act. It would produce the ridiculous result that 51 professional employees could be combined with 49 non-professional employees without being afforded the choice of a separate bargaining unit, while 49 professional employees could not be combined with 51 non-professional employees unless the professional employees themselves so wished. We do not believe Congress gave statutory sanction to the right of professional employees to be represented in bargaining units of their own choosing only to have such right frittered away in an administrative game of numbers.[19]

---

[19] The Board asserts that Congress inferentially approved of the "predominantly professional" construction of Section 9(b)(1) by remaining silent when apprized of such construction in the 1948 Hearings before the Joint Committee on Labor-Management Relations and in the Board's 1948-1949 Annual Reports. It would be novel indeed to transmute into legislative history without more the statements of an administrative agency made to a subsequent Congressional committee or to Congress itself. If such were the case the annual report or the appearance of an agency official before a committee of Congress would provide the medium for a continuous legislative convention. But the fact that the Joint Committee did not recommend overruling the Board's "predominantly professional" construction of Section 9(b)(1) can not be construed as legislative approval, for Congress never acted upon even the recommendations made by the Committee. In fact, since 1947, Congress has never undertaken any comprehensive revision of the National Labor Relations Act. Thus the question is an open one. Cf. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365-6.

Conclusion

For the foregoing reasons, it is respectfully submitted that the order of the District Court be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

BOYD S. LEEDOM, ET AL., Individually and as Chairman and Members of and Constituting the National Labor Relations Board, *Petitioners*

v.

WILLIAM KYNE, Individually and as President of Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, A Voluntary Unincorporated Labor Organization, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INDEX

	Page
Interest of the Amicus Curiae	1
Question Presented	3
Summary of Argument	4
Argument	9
I. Federal District Courts have jurisdiction to review and set aside Board actions in violation of express statutory prohibitions	9
A. The Board's violation of an express statutory prohibition will, if not corrected by the courts, effectively deny professional employees the rights granted in the Act	9
B. Where the Board has violated a specific statutory prohibition, the courts have exercised jurisdiction in equity proceedings	12
II. Judicial review through the "unfair labor practice" procedure of Board certifications which violate express statutory language is not provided by the Act, nor is it a practical solution to remedy injury to the aggrieved party	19
III. The statutory language and legislative history supports the right of professional employees to separate elections regarding inclusion with non-professional employees in ALL representation elections	23
A. The statutory language is clear	23
B. The legislative history of Section 9(b)(1) supports total separation of professional employees in all circumstances	25
C. There is no rational basis for the "predominantly professional" theory as applied by the Board in certification cases involving professional employees	28
Conclusion	32

AUTHORITIES CITED

CASES: Page

Boeing Airplane Co., 86 NLRB 368 (1949) 30
Caminetti v. U. S., 242 U.S. 470 25
Continental Motors Corp., 77 NLRB 345 (1948) . . 9, 29, 30
DePratter v. Farmer, 98 U.S. App. D.C. 74, 232 F. 2d 74 (1956) 5, 12, 13
E. R. Squibb and Sons, 83 NLRB 792 (1949) 30
Ex Parte Collett, 337 U.S. 55 (1948) 24
Farmer v. United Electrical Workers, 93 U.S. App. D.C. 178, 211 F. 2d 36 (1953), *cert. denied*, 347 U.S. 943 (1954) 5, 12, 19
Federal Telecommunications Laboratories, Inc., 92 NLRB 1395 (1951) 30
Gemsco, Inc. v. Walling, 324 U.S. 244 (1944) 24
Harmon v. Brucker, Nos. 80 and 141, October Term, 1957, decided March 3, 1958 ..... 6, 16, 17, 18
Kentucky Synthetic Rubber Corporation, 95 NLRB 453 (1951) 21
McCarthy Chemical Company, 98 NLRB 1084 (1952) 21
Miller Electric Co., 101 NLRB 1014 (1952) 30
Millis v. Inland Empire District Council, 79 U.S. App. D.C. 214, 144 F. 2d 539 (1944), *aff'd*, 325 U.S. 697 (1945) 13
NLRB v. Glen Raven Knitting Mills, Inc., 235 F. 2d 413 (4th Cir. 1956) 19
NLRB v. Gullett Gin Co., 340 U.S. 361 (1950) 31
Packard Motor Car Co. v. NLRB, 330 U.S. 485 25
Potomac Electric Power Co., 99 NLRB 219 (1952) .. 30
Schwarz Laboratories, Inc., 89 NLRB 930 (1950) ... 30
Standard Oil Co., 107 NLRB 1524 (1954) 30
Swift & Co., 98 NLRB 746 (1952) 30
Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943) 5, 14
The Texas Company, NLRB case 4-RC-3024, NLRB Press Release W-470 (Sep. 1956) 10
U.S. v. American Trucking Ass'ns., 310 U.S. 534 (1939) 24
U.S. v. Public Utilities Commission, 345 U.S. 295 ... 25
Westinghouse Electric Corp., Lamp Div., 80 NLRB 591 (1948) 30
Westinghouse Electric Corp. (South Philadelphia Works), 89 NLRB 8 (1950) 30

STATUTES: Page

Administrative Procedure Act (60 Stat. 237, 5 U.S.C. Sec. 1001):
Section 10 18

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Secs. 151 *et seq.*):
Section 1 ..... 20, 22
Section 2(12) 10, 21, 26, 28
Section 9(b)(1) 3, 4, 5, 7, 8, 9, 11, 13, 14, 15, 16, 17, 22, 23, 24, 25, 27, 28, 29, 30
Section 9(b)(2) 16
Section 9(b)(3) 16
Section 9(c) 4
Section 9(d) 7, 18

Railway Labor Act, as amended (44 Stat. 577, 45 U.S.C. Secs. 151 *et seq.*):
Section 2, Ninth 14

MISCELLANEOUS:

Hearings Before House Committee on Education and Labor, 80th Cong., 1st Sess., vol. 5, p. 2779 (1947) 26
Hearings Before Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., pt. 3, p. 1702 (1947) 25
Hearings Before the Senate Committee on Education and Labor on S. 1000, *et al.*, 76th Cong., 1st Sess., pp. 584-585 22
Hearings Before Joint Committee on Labor-Management Relations, 80th Cong., 2d Sess., pp. 1147-1148, June, 1948 30
National Labor Relations Board *13th Annual Report*, p. 40 (1948) 23
National Labor Relations Board *19th Annual Report*, p. 42 (1954) 15
1 Leg. Hist. L.M.R.A., 1947 (G.P.O. 1948), pp. 417, 472, 551, 654 ..... 27, 28
S. 360, 80th Cong., 1st Sess., Sec. 2 26
H.R. 3020, 80th Cong., 1st Sess. 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 633

BOYD S. LEEDOM, ET AL., Individually and as Chairman and Members of and Constituting the National Labor Relations Board, *Petitioners*

v.

WILLIAM KYNE, Individually and as President of Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, A Voluntary Unincorporated Labor Organization, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

Consent for the filing of this brief *Amicus Curiae* was granted by respondent and petitioner; stipulation of consent is being submitted simultaneously herewith.

The National Society of Professional Engineers, hereinafter referred to as the Society, is a non-profit

corporation organized and existing under the laws of South Carolina, with headquarters maintained in Washington, D. C. It was founded in 1934 "as an educational institution [dedicated] to the promotion and the protection of the profession of engineering as a social and economic influence vital to the affairs of men and of the United States." (Extract from Constitution and Bylaws of the Society).

Membership in the Society is restricted to individuals who obtain and retain registration as a Professional Engineer or Engineer-in-Training under the engineering registration laws which are in force in all States, Territories, Possessions and the District of Columbia. The membership of the Society is approximately 46,000. Forty-six state societies of professional engineers are affiliated with the Society and within the state societies there are approximately 365 local chapters.

From its inception, the Society has interested itself in the effect of National laws on the engineering profession and in this connection it has taken a leading part in bringing to the attention of appropriate Committees of Congress, from time to time, data bearing on the impact of Federal legislation upon the engineering profession.

The case before this Court is one of first impression on an aspect of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), which particularly and peculiarly involves all professional engineers who are "employees" under the Act, including many members of the society. It is, in fact, estimated that there are approximately 500,000 engineers in the United States, most of whom are "employees,"

and who will be vitally affected by the disposition of the pending case.

In the interest of protecting and maintaining the separate election rights granted these professional employees by Section 9(b)(1) of the Act, this brief is respectfully submitted.

QUESTION PRESENTED

According to the Petitioners' Brief (p. 2) the question presented to this Court is as follows:

> Whether a federal district court has jurisdiction to set aside a certification issued by the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, as amended, upon allegations by the labor organization receiving the certification that the Board failed to comply with statutory requirements in establishing the bargaining unit covered by the certification.

In its appeal to the court below, Petitioner did not contest the interpretation of Section 9(b)(1) as handed down by the district court to the effect that the Board in commingling professional with nonprofessional employees in a voting unit without first conducting a separate election among the professional employees disregarded a mandatory limitation upon its authority. The district court further concluded that the Board's failure to conduct the required election worked irreparable harm to the statutory right of the professional employees. (R. 24-32).

Since the Board failed to object to this proper interpretation by the district court, the reference in its "question presented" to "allegations" by the labor organization that the Board failed to comply with statutory requirements tends to minimize and negate the

finding by the district court, uncontested by the Board, that an express statutory requirement had been violated. Thus, the question before this Court is based upon an accepted conclusion of extra-statutory action, rather than a mere allegation of such act.

We submit, therefore, that the proper question before this Court is whether a federal district court has jurisdiction to set aside a certification issued by the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, as amended, when the Board has admittedly failed to comply with the express statutory mandate of Section 9(b)(1) which holds, in effect, that professional employees cannot be commingled with nonprofessional employees in a voting unit without first conducting a separate election among the professional employees to determine whether a majority of them favor inclusion within a unit with nonprofessional employees.

SUMMARY OF ARGUMENT

I

Section 9(b)(1) of the National Labor Relations Act, as amended, provides that the Board shall not decide that any unit is appropriate for purposes of collective bargaining if such unit includes both professional and nonprofessional employees, unless a majority of the professional employees vote for inclusion in such a mixed unit. The Board, however, has interpreted and applied this statutory prohibition to mean that professional employees are entitled to a separate vote regarding inclusion with nonprofessionals only when the professional employees constitute a numerical minority in the proposed unit. Thus, in units which are "predominantly professional" the Board

has denied the professional employees their rights to a separate vote.

Such a construction denies professional employees their rights granted in the Act inasmuch as there always exists the possibility that the nonprofessional votes could actually be the deciding factor in the certification election whether or not the professional employees were numerically predominant. The very characteristics of professional employees differentiating them from other employees, which were recognized by Congress as evidenced by the language of Section 9(b)(1), demand that they alone, without the participation of nonprofessional employees, determine their choice with regard to collective bargaining representation.

There is no discretion on the part of the Board with respect to the application of rights granted professional employees as contained in Section 9(b)(1). Rather, the language demonstrates an express, mandatory prohibition on the Board's authority, the violation of which is subject to direct judicial review in a separate equity proceeding. *Farmer* v. *United Electrical Workers,* 93 U.S. App. D.C. 178, 211 F. 2d 36 (1953), *cert. denied,* 347 U.S. 943 (1954); *DePratter* v. *Farmer,* 98 U.S. App. D.C. 74, 232 F. 2d 74 (1956). Cases which have denied jurisdiction to review the exercise of general discretionary action by the Board are completely distinguishable from the instant case involving the Board's violation of the express language of Section 9(b)(1). *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297 (1943), upon which the Board so heavily relies to sustain its position, is neither controlling nor, in fact, in point.

The Board is of the opinion that a ruling unfavorable to its view could result in a situation in which each representation determination could be cast in terms of an alleged excess of statutory authority, with a consequent court review in each instance. Such a position is unwarranted for two reasons. First, the instant situation is based on a specific violation of a definite prohibition on the Board's power rather than on a claim of arbitrary or capricious action under its discretionary authority. Second, a holding in accord with the contention of the *amicus curiae* would go only to a relatively small percentage of Board unit determinations which involve those portions of the Act which impose specific prohibitions on the Board's authority, *i.e.* provisions in Section 9(b) pertaining to professional employees, guards or determinations based on a different unit established by prior Board decision.

The question of judicial review of Federal agency action contrary to specific statutory limitations and prohibitions was before this Court in the recent case of *Harmon* v. *Brucker,* Nos. 80 and 141, October Term, 1957, decided March 3, 1958. In *Harmon,* this Court re-affirmed the well-established proposition that judicial relief is available to one who has been injured by an act of a government official which is in excess of his express powers, and that a claim for such relief may be entertained by the district court. Since the Secretary of the Army in *Harmon* v. *Brucker,* like the Board in the instant case, conceded that statutory powers had been violated, that decision is determinative of the question presently before this Court.

II

The Board contends that there can be no direct judicial review of representation determinations, and that such was the intent of Congress, inasmuch as the Act does provide in Section 9(d) for review of representation proceedings when a certification has become the basis for an unfair labor practice order, and that order is itself before the Court of Appeals for review or enforcement. In this connection the Board would have the Engineers Association engage in activities designed to encourage the filing of an unfair labor practice charge against it, so that by this devious route the Association could then challenge the Board's representation determination. This position, which suggests that the Association defend its rights by deliberately engaging in an illegal act, is diametrically opposed to a basic purpose of the Act "to provide orderly and peaceful procedures for preventing the interference" by management or labor with the legitimate rights of each other. Furthermore, judicial review via the unfair labor practice route to remedy injury of an aggrieved party resulting from the Board's extra-statutory action, is an indirect, costly and delayed means for achieving what the courts have held could be accomplished by a direct equity proceeding.

III

Since the Board has sought to justify its position on the jurisdictional issue (which is the only issue before this court) by reference to its belief that its interpretation of Section 9(b)(1) has a rational basis, the *amicus curiae* is compelled to bring to the attention of this Court the propriety of the district court's inter-

pretation of Section 9(b)(1) and the defects inherent in the Board's claim.

A literal reading of the unambiguous language of Section 9(b)(1) admits of only one interpretation—that a unit is not appropriate if it includes both professional employees and nonprofessional employees unless the professional employees first vote to include themselves in the heterogeneous unit. There is nothing in this language which suggests that the Board may find some exceptions to the clear mandate laid down by Congress. Even though the language of this section is precise enough in its prohibition, its legislative history further reinforces the interpretation gleaned from a literal reading.

The Board's "predominantly professional" theory, under which it seeks to justify the inclusion of nonprofessional employees with professional employees without regard to the separate voting rights of the professionals, constitutes an arrogation unto itself of the complete right to determine the limitations of the policy which it has established. There are no standards, limitations or controls except those it may choose to apply to itself. Neither a literal reading nor reference to legislative history supports in any manner the Board's position that separate elections for professional employees are required only when they constitute a minority in the proposed bargaining unit.

ARGUMENT

I

FEDERAL DISTRICT COURTS HAVE JURISDICTION TO REVIEW AND SET ASIDE BOARD ACTIONS IN VIOLATION OF EXPRESS STATUTORY PROHIBITIONS

A. The Board's violation of an express statutory prohibition will, if not corrected by the courts, effectively deny professional employees the rights granted in the Act.

Section 9 (b)(1) of the National Labor Relations Act, as amended, imposes an express statutory prohibition on the Board that a unit for purposes of collective bargaining is not appropriate if it includes both professional and nonprofessional employees, unless a majority of the professional employees vote for inclusion in such a mixed unit.[1] The inherent and basic principal of the statutory right of self-determination confined to professional employees is that the professionals, due to different backgrounds, education, professional viewpoint, ethical standards, etc., are entitled to decide their acceptance or rejection of collective bargaining representation, or the choice of a representative if they decide for representation, uninfluenced or controlled by those from essentially different backgrounds and viewpoints, *i.e.* the nonprofessional employees.

The historical background of the Board's neglect of this precise statutory langauge, and the establishment of its "predominantly professional" theory leading to the instant case, began with *Continental Motors Corp.*,

[1] Section 9(b)(1) provides that: "*Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes [collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit * * *."

77 NLRB 345 (1948). In *Continental Motors, supra,* there were approximately 90 eligible voters in the "professional" group. Of 85 votes cast, 42 were for the petitioning union and 39 were aganist the petitioner (4 votes were challenged). The employer had challenged the professional status under the Act of nine employees in the blueprint room. But the Board rejected the employer's challenge, stating that it was not necessary to pass upon the professional status of the nine employees because the bargaining unit was composed *predominantly* of professional employees. In view of the closeness of the vote, it may very well have been the case that a majority of the *professional* employees voted against the petitioning union, and that the wishes of the majority were frustrated by the vote of the employees in the blueprint room, whose professional status was not determined by the Board, and who may well have been found to be nonprofessional employees within the definition of Section 2(12) of the Act.

A practical illustration of the way in which the Board's action could deny professional employees their separate rights under the "predominantly professional" theory is afforded by a representation election at The Texas Company, Westville, New Jersey. NLRB Case 4-RC-3024. At this election, which was held September 7, 1956 among all professional engineers and chemists, 15 votes were cast for the petitioner, Association of Professional Engineers and Chemists (independent); and 15 against. The association was denied certification as the bargaining representative for failure to achieve the necessary majority vote. If the above-mentioned factual situation were slightly altered to add one more eligible vote to the 30

votes cast, and if that one vote were cast by an admittedly nonprofessional employee, there would be the anomalous situation in which the single vote of a nonprofessional employee could decide the collective bargaining fate of a group *more* than "predominantly professional," since such a single nonprofessional vote would effect a majority for the successful side.

Thus, in spite of the Board's contention that professional employees need be granted separate election rights only when the professional employees constitute a minority in the unit deemed appropriate, it can be seen that since professional employees can and do differ among themselves regarding representation for collective bargaining or the choice of a representative, the votes of nonprofessional employees could turn the tide in deciding upon the question of bargaining representation for the professional employees.

In any instance wherein nonprofessionals are included in a unit with professional employees, without the consent of the professionals, there exists the possibility that the nonprofessional votes could actually be the deciding factor in the certification election whether or not the professional employees were numerically predominant.

Such a result was not contemplated by Congress when Section 9(b)(1) was enacted. The very characteristics of professional employees differentiating them from other employees demand that they, and they alone, determine their choice with regard to collective bargaining representation.

Any system or theory which permits the commingling of nonprofessional employees without the consent of the professionals, then, denies the professional em-

ployees their statutory right to decide their own fate without the participation of nonprofessional employees.

B. Where the Board has violated a specific statutory prohibition, the courts have exercised jurisdiction in equity proceedings.

It has been consistently held that where the Board has violated clear, mandatory statutory language, courts have assumed jurisdiction to review such actions in a separate equity proceeding.

In *Farmer* v. *United Electrical Workers*, 93 U.S. App. D.C. 178, 211 F. 2d 36 (1953), *cert. denied*, 347 U. S. 943 (1954), which involved a finding that the Board's investigation into the truth of non-Communist affidavits filed by certain union officers was beyond the Board's statutory authority, the Court of Appeals held:

> It is clear enough that review of Board action in the Court of Appeals is limited to unfair labor practice proceedings under Sec. 10. But the question whether action, preliminary to such proceedings and plainly beyond the scope of statutory authority, may be reviewed by the District Court in the exercise of its equity power was twice reserved by the Supreme Court to await 'the required showing of unlawful action by the Board and resulting injury * * * whether by way of departure from statutory requirements or from those of due process of law.' We think the required showing is presented in these cases.

In the later case of *DePratter* v. *Farmer*, 98 U.S. App. D.C. 74, 232 F. 2d 74 (1956), it was again recognized that Board proceedings are reviewable in an original equity suit in the district court if there is a

showing of unlawful action by the Board "by way of departure from statutory requirements or from those of due process." While the Court in *DePratter* found that the Board's determination of an appropriate unit consisting of full-time and part-time production workers was within its statutory authority, it was noted, however, that the approval of such a unit was "within the Board's discretion."

The commingling of professional with nonprofessional employees in a voting unit without first affording the professionals separate voting rights in all cases constitutes a clear departure from express statutory requirements, and accordingly, under the principle announced in the above-cited cases, the district court has jurisdiction to directly review such Board action in a separate equity proceeding. The conclusion is inescapable, therefore, that proceedings of the Board are directly reviewable by separate equity suit in the district courts if the Board has violated an express statutory prohibition. Cases cited in the Board's brief wherein the Courts have refused to review Board determinations under the grant of general discretionary authority, which authority was found not to have been abused, are thus distinguishable on this point.[2]

Cases wherein the Board is granted and exercises general discretionary authority in unit determinations, jurisdiction for the review of which are denied to the district courts, are completely distinguishable from the instant case involving the Board's action under Section 9(b)(1). Under Section 9(b)(1), the Board has no discretion; rather, the power of the Board with re-

[2] See *Millis* v. *Inland Empire District Council*, 79 U.S. App. D.C. 214, 144 F. 2d 539 (1944), *aff'd*, 325 U.S. 697 (1945).

spect to representation determinations involving professional employees is clearly and explicitly limited by the proviso "That the Board *shall not* (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit * * *." (emphasis added).

The Board's reliance on this Court's decision in *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943) is clearly not controlling, nor, in fact, in point to the instant case. There, Section 2, Ninth of the Railway Labor Act, which the Board says is "analogous to Section 9 of the National Labor Relations Act," (Board's brief, p. 27) refers to "* * * craft or class for the purposes of this Act" giving the administrative agency an obvious wide discretion to determine the appropriate craft or class in which the election should be held. This authority is similar to the broad discretionary grant authorized the Labor Board in the opening language of Section 9(b). But there the so-called "analogy" stops. The Railway Labor Act does not go on, as does the 9(b)(1) proviso, to stipulate additional specific limitations and prohibitions over and above the general grant of discretionary power. Thus, the Board's position that *Switchmen's* is precisely in point to the instant case is totally without merit. The foreclosure of judicial review of discretionary administrative determinations, concluded in the *Switchmen's* case, cannot be extended to preclude court review of administrative action which constitutes a clear departure from a statutory prohibition.

The language of this Court in that case[3] supports the position of the respondent:

> * * * Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end, * * *

Congress in the National Labor Relations Act also created a right and decided upon the method for its protection and "selected the precise machinery and fashioned the tool which it deemed suited * * *," in a different manner. We refer, of course, to the right granted professional employees under the Act and to the fact that the Board cannot lawfully include professional employees and nonprofessional employees in the same unit unless the professional employees by separate vote decide to be included in the unit with nonprofessional employees.[4]

The Board's fear that a ruling unfavorable to its view could result in a situation wherein virtually "* * * every Board determination in each of the numerous representation proceedings processed by the Board could be cast in terms of an alleged excess of statutory authority, thereby completely frustrating Congress's intention to limit the reviewability of such proceedings," (Board's brief, p. 26) is not justified on two grounds. First, the original equity suit in the present case did not rest on a claim of arbitrary

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[3] 320 U.S. at 301.

[4] The Board itself recognized the existence of this right and the machinery fashioned to protect it when it stated: "Self-determination elections as to the inclusion of professional employees in units with nonprofessionals are mandatory under section 9(b)(1) of the act." (Nineteenth Annual Report of the NLRB, p. 42).

or capricious action under the Board's discretionary power over unit determinations under the general authority of Section 9; rather it rested on a specific violation of a definite prohibition on the Board. Second, a holding that the Board's action contrary to a specific prohibition is reviewable by the Court would go only to those portions of the Act which impose specific prohibitions on the Board's authority, such as in the case of professional employees (Section 9(b)(1)); a determination based on a different unit established by prior Board decision (Section 9(b)(2)); or the inclusion of guards in a unit with other employees (Section 9(b)(3)). These specific prohibitions are explicit and few in number, involving a relatively small percentage of Board unit determinations, and, therefore, could not reasonably be expected to result in the flood of court challenges which the Board appears to contemplate.

In any event, there is no warrant for denying judicial corrective action where an administrative agency acts contrary to the specific limitations and prohibitions which Congress has seen fit to impose on it.

This very point was concisely expressed by this Court in the recent decision of *Harmon* v. *Brucker*, Nos. 80 and 141, October Term, 1957, decided March 3, 1958. There this Court held that the district court possessed jurisdiction to review certain discharges granted to two soldiers by the Secretary of the Army, upon allegations that the Secretary had exceeded his statutory authority. In the course of its decision, this Court said:

> Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. [Citations] The District Court had not only

> jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available. Moreover, the claims presented in these cases may be entertained by the District Court because petitioners have alleged judicially cognizable injuries. [Citations]

The *Harmon* decision applies squarely to the instant case. Here, the district court assumed jurisdiction and properly concluded that it had jurisdiction. In addition the district court construed the express language of Section 9(b)(1) to the effect that the Board had exceeded its powers because it disregarded an express limitation upon its authority with the result that irreparable harm was worked upon the statutory right of the respondent. Further, the Board's extra-statutory action does not constitute the exercise of its administrative discretion.

In the *Harmon* case, as in the instant case, there was a concession that statutory powers had been exceeded and that the basic question to be decided was concerned with jurisdiction to review.

It is essential to note that the principle of the *Harmon* case was applied in the face of an underlying statute which provided in effect that the findings of the Secretary of the Army would be final. There is no similar provision in the National Labor Relations Act, as amended, with respect to representation determinations. In order to sustain its position that Congress intended all Board representation rulings to be final, ex-

cept to the limited extent permitted by Section 9(d), the Board relies heavily on legislative history. We submit, therefore, that if the *Harmon* principle of judicial review of extra-statutory acts can be applied in spite of an obvious limitation on court review in the underlying statute, then the same principle can be applied with even more vigor in the instant case where the underlying statute is silent on the question of court review of representation determinations (except to the limited extent in Section 9(d)).

According to the Board's brief (footnote 23, p. 33), the Administrative Procedure Act of 1946 (60 Stat. 237, 5 U.S.C. Sec. 1001) cannot be utilized by respondent as an avenue of relief inasmuch as the Act is inapplicable to (1) statutes which preclude judicial review, or (2) agency action which is by law committed to agency discretion. This contention would have merit if the two prerequisites for inapplicability were present. However, the presence of neither can be sustained. Representation determinations by the Board in cases involving professional employees do not fall into the area of agency discretion. In addition, the inclusion in the National Labor Relations Act of explicit procedure for review of Board actions through the charge of an unfair labor practice, does not support the contention that direct review is thereby precluded in other situations, e.g. where the agency violates a definite prohibition of its powers.

Contrary to the Board's position, respondent does have a basis for an independent suit by virtue of Section 10 of the Administrative Procedure Act which specifically provides, *inter alia*, for judicial review of agency action or decisions "in excess of statutory juris-

diction, authority, or limitations, or short of statutory right; * * *."[5]

II

JUDICIAL REVIEW THROUGH THE "UNFAIR LABOR PRACTICE" PROCEDURE OF BOARD CERTIFICATIONS WHICH VIOLATE EXPRESS STATUTORY LANGUAGE IS NOT PROVIDED BY THE ACT, NOR IS IT A PRACTICAL SOLUTION TO REMEDY INJURY TO THE AGGRIEVED PARTY

The Act itself, and its legislative history, shows that the unfair labor practice procedure and remedies, upon which the Board so heavily relies as a panacea, was to operate on and against the parties to collective bargaining by specifying certain practices as improper and providing enforcement machinery to prevent the commission of such prohibited practices. The point in issue in this case is quite distinct from this, in that the restriction operates against the Board, not against the parties. It was neither contemplated nor intended that a prohibition on the Board should be enforced by the devious route of attaching the prohibition on the parties.

The detailed procedure as set out in the Board's brief (footnote 12, p. 22) by which the Engineers Association could challenge the Board's representation determination as erroneous, is at best an expensive, lengthy and indirect method of accomplishing what the courts have held could be achieved by direct judicial review.[6]

Further, the alternative procedure of securing a test of the certification through the unfair labor practice route, suggested by the Board, is unique, if not startling. The Board, in effect, suggests that the Engineers

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[5] See *NLRB* v. *Glen Raven Knitting Mills, Inc.*, 235 F. 2d 413 (4th Cir. 1956).

[6] See *Farmer* v. *United Electrical Workers, supra.*

Association defend its rights by deliberately engaging in an illegal act. The suggested avenue is all the more disconcerting in the face of the Congressional language in Section 1 of the Act that "neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest," and, later, "It is the purpose and policy of this Act, * * * to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." The Board now says, in effect, that the very practices which the Act proscribes should be adopted by one of the parties as an admittedly artificial means of protecting the specific right granted in the Act. For an administrative agency to recommend a deliberate violation of the Act it is charged with enforcing is a novel concept of administrative law.

Even if this concept be accepted, there is no assurance that after years of litigation the union would finally have its rights declared in final effective form. If the Engineers Association makes a demand on the employer to bargain for only a part of the certified unit, and the employer refuses, as he logically must refuse, there is no incentive for the employer to bring an unfair labor practice charge. He has lost nothing. The nine employees whom the Engineers Association refuses to represent may, the Board suggests, bring the charge. As a practical matter and as concluded by the court below (R. 39), it is exceedingly unlikely that nine employees in such a situation would undertake a lengthy and expensive procedure. The Board, however, is of the opinion that the conclusion of the

court below is unwarranted, particularly insofar as the filing of charges by the nine nonprofessionals is concerned.[7]

The Board's line of reasoning and suggestions in connection with the "unfair labor practice" avenue to remedy an erroneous representation determination says nothing more than that Congress may enact limi-

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[7] The Board has sought to justify its inclusion of the nine nonprofessional employees in the unit with the professionals on the practical ground that they have a close community of interest with the professional employees, and if they, as a "small fringe group," were excluded from the professional unit there would be no satisfactory method of protecting their rights under the Act. This solicitous concept is untenable for two reasons. First, the employee categories in dispute are engineer order service, engineer test record, and engineer contact. Having been found by the Board not to be within the professional employee definition (Section 2(12)), the employees in these categories could properly be designated as "technicians," a classification which has been established and well-recognized by the Board over the years. Accordingly, the Board could include the technicians in a clerical unit, or allow them to remain in the unit represented by the Intervenor (Buffalo Salaried Employees Association).

Second, the Board contended that the alternative of establishing a separate unit composed only of the few technicians would not be appropriate because it is doubtful that the technicians would enjoy equality of bargaining power between employers and employees. It is noted, however, that this argument is inconsistent with previous Board decisions which found even smaller units to be appropriate. In a case in which it was sought to establish three bargaining units with a total of only eight employees, the Board rejected the Employer's objection, stating: "• • • a comparatively small number of employees in a proposed unit is not a factor of special relevancy where the requested group could constitute an appropriate unit by other Board standards." *McCarthy Chemical Company*, 98 NLRB 1084, 1085 (1952). Even more persuasive of the unsoundness of the claim made by the Board is its prior decision that "• • • it is well settled that two employees may constitute an appropriate unit." *Kentucky Synthetic Rubber Corp.*, 95 NLRB 453, 456 (1951).

tations, prohibitions, restrictions and bars to no avail; that an administrative agency may thwart the clear Congressional intent as expressly stated in the language of the statute.

Furthermore, the parties could be involved in costly litigation involving a long delay, and possible appeal to the Supreme Court, all of which could consume two or more years, during which period their rights under the Act would be in suspension. It is interesting to note that the Board itself recognized that even under a proposed amendment which would permit direct review of representation proceedings, it would take a year to obtain an Appellate determination.[8] If direct equitable review of Board action, according to the Board itself, could consume a year, is it not reasonable to assume that the more involved "unfair labor practice" procedure would take up twice as much or more time? Such a policy as the Board now suggests is contrary to the policies of the Act for the "orderly and peaceful" (Section 1) settlement of labor disputes.

Since the language of Section 9(b)(1) of the Act is so clear, and the Board's derogation of prohibitory language likewise so clear, the parties should have access to direct equitable relief without going through

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[8] Hearings Before the Senate Labor Committee on S. 1000, *et al.*, 76th Cong., 1st Sess. pp. 584-585 where the Board stated: "Proceedings for review of a Board's certification would require from 6 months to a year in the circuit court of appeals. Thereafter the losing party would have 3 months in which to apply for certiorari to the Supreme Court, and if certiorari were granted, several more months would pass before final decision could be rendered. * * * All in all, it can be conservatively estimated that, on the average, it would take a year to obtain review of a Board certification."

the unnecessary motions of encouraging an unfair labor practice charge.

III

THE STATUTORY LANGUAGE AND LEGISLATIVE HISTORY SUPPORTS THE RIGHT OF PROFESSIONAL EMPLOYEES TO SEPARATE ELECTIONS REGARDING INCLUSION WITH NONPROFESSIONAL EMPLOYEES IN ALL REPRESENTATION ELECTIONS

A. The statutory language is clear.

Section 9 (b) (1) of the Act is precise and exact in imposing an absolute prohibition upon the Board in the determination of appropriate units. The statutory language admits of only one interpretation—that a unit is not "appropriate" if it includes both professional employees and nonprofessional employees unless the professional employees first vote to include themselves in the heterogeneous unit. And there is nothing in the language which indicates, however remotely, that the Board may find some exceptions to the clear mandate laid down by Congress.

It is of some significance that the Board's *Thirteenth Annual Report,* for the fiscal year ended June 30, 1948, the first annual report following the 1947 amendments to the Act, said of the new professional separation provision:

> This amendment substantially codifies the Board's prior practice of placing professional employees in separate bargaining units, or excluding them from units of other employees wherever the record in a particular case indicated that the professional personnel desired to be segregated. But it removes the matter from the Board's discretion *and permits of no exceptions to the general rule.* (*Thirteenth Annual Report of the NLRB,* p. 40, emphasis added.)

In spite of this clear manifestation of Congressional intent, which the Board has previously recognized, the Board in its brief in the instant suit (p. 34) contends that "although a literal reading of this language [referring to Section 9(b)(1)] may support the conclusion that the limitation was intended to apply *whenever* the Board intended to group professional employees in the same unit as nonprofessional employees, the legislative history of the proviso shows that it had a narrower purpose." In other words, the Board claims that regardless of the fact that the language is clear, we must nevertheless refer to its legislative history. Prior decisions of this Court indicate unequivocally that such a position is completely without merit.

As Chief Justice Vinson said in *Ex Parte Collett*, 337 U.S. 55 (1948),

> there is no need to refer to the legislative history where the statutory language is clear. * * * This canon of construction has received consistent adherence in our decisions. [citing cases]

Justice Rutledge said in *Gemsco, Inc.* v. *Walling*, 324 U.S. 244 (1944):

> The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance may furnish dubious bases for inference in every direction.

And in *U. S.* v. *American Trucking Ass'ns*, 310 U.S. 534 (1939), Justice Reed declared:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in

and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning.

Without belaboring this point, we believe it sufficient to state that since the 9(b)(1) proviso is so definite and unambiguous on its face, admitting of only one interpretation of the intent of Congress with respect to the rights of professional employees in representation elections, any recourse to legislative history or other extrinsic factors is completely irrelevant.[9]

B. The legislative history of Section 9(b)(1) supports total separation of professional employees in all circumstances.

Although we have pointed out above that a literal reading of Section 9(b)(1) sufficiently indicates the intent of Congress, we are nevertheless constrained to discuss the legislative history of 9(b)(1), which in our opinion is completely consistent with the interpretation gleaned from a literal reading of the proviso, inasmuch as the Board has brought this matter before this Court even though frankly admitting that the merits of the statutory interpretation of 9(b)(1) are not at issue. (Board's brief, p. 34).

The principal proponents for the inclusion of provisions in the amended Act dealing specifically with the rights of professional employees were a group of national engineering societies, including the *amicus curiae*, which appeared before the Congressional committees as a panel. (Hearings Before Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess.,

[9] For additional Supreme Court cases applying the "literal" rule of statutory construction, see: *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, *Caminetti* v. *U.S.*, 242 U.S. 470, and *U.S.* v. *Public Utilities Commission*, 345 U.S 295.

part 3, p. 1702 (1947); Hearings Before House Committee on Education and Labor, 80th Cong., 1st Sess., vol. 5, p. 2779 (1947)). The gist of the testimony was that the National Labor Relations Board had swept professional employees into collective bargaining units overwhelmingly composed of nonprofessional employees and that such forced amalgamation foreclosed a proper determination of the desires of the professional employees in matters of collective bargaining. It was made clear in the testimony that there was no intent to prohibit collective bargaining rights for professional employees, but that it was desired that professional employees be entitled as a matter of right to a separate determination of their wishes upon collective bargaining questions.

The major burden of the testimony was that professional employees have an essentially different background and outlook from nonprofessional employees, and the intended distinction between the two was stated in testimony in the following language: "Wherever the term 'non-professional' is used in the following discussion, reference is made to employees whose duties do not fall within this definition." (Sec. 2, S. 360, 80th Cong., 1st Sess.; now Sec. 2 (12) of the Act.) Thus, the principal sponsors of the provisions of the Act now before the Court had in mind a complete and total distinction between the professionals and nonprofessionals. This intention is further confirmed by one of three specific points recommended to Congress for correction of the problem: "(2) No professional employee, or group of professional employees, desiring to undertake collective bargaining with an employer, should be forced to *affiliate with*, or become members of, any bargaining group *which includes non-profes-*

sional employees, or to submit to representation by such a heterogeneous group or its designated agents." (Emphasis added)

It is correct that the principal purpose of Section 9 (b) (1) was to protect professional employees from being engulfed by a more numerous group of nonprofessional employees. That was the major reason for seeking corrective legislation and was stressed in the testimony of the National engineering societies. The point in issue involves the mechanism which Congress adopted to meet this problem.

It is the contention of the *amicus curiae* that Congress adopted a method of solution along the lines recommended by the National engineering societies, i.e., that the Board be prohibited from including *any* nonprofessionals with professionals in a voting unit.

Thus, while the Board stressed in its argument to the district court that the *purpose* of the provision in the House bill (H.R. 3020, 80th Cong., 1st Sess.) was to prevent "distinguishable *minorities*" from being "forced * * * into bargaining units against their will," the House Conference Report, explaining the *method* to be followed, states that "the Board cannot include both professional employees and employees who are not professional employees in the same unit, unless a majority of the professional employees vote for inclusion therein." (1 Legislative History of the Labor Management Relations Act, 1947, Govt. Print. Off., 1948, p. 551.) Opponents of the professional separation provision understood that total separation would be required under the House bill. Representative Klein, a member of the House Committee, for example, stated on the House floor, "Any splinter group, how-

ever small, must be separated if an 'interested person' desires it, and if the group is 'distinguishable.'" (1 Leg. Hist. 654.) Professional employees are admittedly "distinguishable" under the Act in view of Section 9 (b)(1) and the definition of "professional employee" (Sec. 2(12)).

Likewise, the Senate Committee Report described the *method* to be employed by the Board as one in which "* * * the Board is required to afford such groups [professional employees] an opportunity to vote in a *separate* unit to ascertain whether or not they wish to have a bargaining representative of their own." (1 Leg. Hist. 417, emphasis supplied.) The minority report of the Senate Committee also noted that the language adopted was a "* * * restriction on the discretion of the Board * * *" and would "* * * *bar* the Board from finding appropriate a unit of both professional and nonprofessional employees unless a majority of the professionals voted for inclusion in the unit." (1 Leg. Hist. 472, emphasis supplied.)

C. There is no rational basis for the "predominantly professional" theory as applied by the Board in certification cases involving professional employees.

We fully realize that the question of the propriety of the district court's interpretation of Section 9(b)(1) is not before this Court. However, since the Board has sought to justify its position on the jurisdictional issue by reference to its belief that its "interpretation of Section 9(b)(1) has a rational basis," we are compelled to bring to the attention of this Court the defects inherent in the Board's claim.

The Board's "predominantly professional" theory under which it feels justified in including nonprofes-

sional employees with professional employees in a voting unit without regard to the desires of the professionals where the professionals are numerically superior, constitutes an arrogation unto itself of the complete right to determine the limitations of the policy which it has established. Since there is nothing in the Act authorizing the application of the "predominantly professional" theory, it follows that there are no standards, limitations or controls on the Board as to how far it may go in applying its doctrine, except those it may choose to apply to itself. Presumably the Board could hold a voting unit "predominantly professional" if fifty-one percent of the employees in that unit were found by the Board to be within the professional definition. We think it is clear that Congress did not intend, and did not grant the Board such power in the light of the deliberate decision to allow professional employees to choose for themselves.

The Act cannot be construed to have intended separate elections for professional employees only when they constitute a minority in a proposed bargaining unit. Section 9(b)(1) is completely silent with regard to "minority" or "majority."

It is clear that the Board has not adopted any standards or specified any minimum or maximum percentages to govern the question of how far it may go in including nonprofessionals in professional voting units. Since the inception of the "predominantly professional" theory in *Continental Motors, supra,* (in which nonprofessionals constituted 10%, the Board has permitted widely varying percentages of nonpro-

fessionals to be included without affording the professionals a separate vote on this point.[10]

However, in a unit determination situation which involved seven professional employees and six nonprofessional employees, the Board did recognize the requirement of the Act which is contended for by the *amicus curiae*: "The Board is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with nonprofessional employees, unless a majority of the professional employees vote for inclusion in such a unit. Accordingly, we must ascertain the desires of the professional employees as to inclusion in a unit with non-professional employees." *Swift & Co.*, 98 NLRB 746, 747 (1952).

The Board contends, in essence, that Congress has acquiesced in the Board's construction of Section 9(b)(1) in the *Continental Motors* case, *supra*, since being apprised of such construction, Congress has neither criticized nor undertaken to modify it.[11] Such a contention is without foundation. Congress has not

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[10] In the following cases, the Board permitted the inclusion of nonprofessional employees in the percentages indicated without affording the professionals a separate vote to determine their desires as to inclusion with nonprofessionals: *Westinghouse Electric Corp., Lamp Div.*, 80 NLRB 591 (1948)—22.2%; *E. R. Squibb and Sons*, 83 NLRB 792 (1949)—11.1%; *Boeing Airplane Co.*, 86 NLRB 368 (1949)—26.0%; *Westinghouse Electric Corp. South Philadelphia Works*, 89 NLRB 8 (1950)—7.2%; *Schwarz Laboratories, Inc.*, 89 NLRB 930 (1950)—29.1%; *Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395 (1951)—31.5%; *Potomac Electric Power Co.*, 99 NLRB 219 (1952)—17.5%; *Miller Electric Co.*, 101 NLRB 1014 (1952)—7.5%; *Standard Oil Co.*, 107 NLRB 1524 (1954)—7.0%.

[11] At Hearings before the Joint Committee on Labor-Management Relations, 80th Cong., 2d Sess., pp. 1147-1148, June, 1948, Chairman Paul M. Herzog said of the *Continental Motors* case: "I am not perfectly sure that the decision was 100 percent good

dealt with the representation aspects of the Act since its passage. Mere presentation to a Congressional committee of administrative interpretations, without any specific or implied endorsement of such interpretation on the part of Congress, cannot be deemed Congressional acquiescence in the interpretation. Silence on the part of the legislative body does not amount to assent to every interpretation placed upon the Act by the Board.[12]

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law. I think it was more than 50 percent good law, and extremely good administrative practice. It seemed to us that the intent of Congress was to give professionals a chance to get out of nonprofessional units, and not to give a few nonprofessionals a chance to tangle things up for professionals. I think that was the basic reason for the decision."

[12] *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361 (1950), upon which the Board relies, involved an exercise by the Board of its discretionary authority which had been followed for many years prior to the 1947 amendments, and which had been sustained in two court cases. The practice of the Board was considered by Congress in the course of adopting the 1947 amendments. And, as this Court said, "Under these circumstances it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the courts."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court be affirmed.

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No. 14.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

BOYD S. LEEDOM, ET AL., Individually and as Chairman and Members of and Constituting the National Labor Relations Board, *Petitioners*

v.

WILLIAM KYNE, Individually and as President of Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, A Voluntary Unincorporated Labor Organization, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF ENGINEERS JOINT COUNCIL AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
(a) The Board's Disputed Unit Finding	2
(b) The District Court Injunction	3
(c) The Decision of the Court of Appeals	4
INTEREST OF ENGINEERS JOINT COUNCIL	5
SUMMARY OF ARGUMENT	9
ARGUMENT	11
1. The Unit Finding of the Board Expressly Departed From the Requirements of the Statute	11
2. Agency Action in Violation of Statute Confers Jurisdiction on District Courts	17
(a) Representation Proceedings Are Immune from Judicial Scrutiny Only Where Challenge to Agency Is Directed to Issues in Which Agency Is Vested With Discretion	17
(b) Congress Did Not Intend to Preclude Judicial Relief Where Review Provided by Section 10 Was Inadequate	20
(c) Such Review as Section 10 Provides Would Afford No Relief to Respondent	24
CONCLUSION	27

CITATIONS

CASES:

American Federation of Labor v. NLRB, 308 U.S. 401, 409-11	20, 21
Bate Refrigerator Co. v. Salzberger, 157 U.S. 1	14
Boeing Airplane Co., 86 NLRB 368	14
Continental Motors Corp., 77 NLRB 345	13, 16
Farmer v. United Electrical, Radio & Machine Workers, 211 F. 2d 36, cert. den. 347 U.S. 943	9

Page

Federal Telecommunications Laboratories, Inc., 92 NLRB 1395 14
Harmon v. Brucker, —U.S. —, decided March 3, 1958, 26 LW 4166-67 9
Inland Empire Dist. Council v. Millis, 325 U.S. 697 ..... 21, 22, 23
International Maritime Union v. Herzog, 334 U.S. 854 26
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 9
Leedom v. International Mine, Mill & Smelter Workers, 352 U.S. 145 ..... 9, 26
Leedom v. Kyne, 249 F. 2d 490, 491 12
Mueller Brass Co. v. N.L.R.B., 86 U.S. App. D.C. 153, 180 F. 2d 402 19
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 ..... 20, 24
N.L.R.B. v. Columbian Enameling & Stamping Co., 306 U.S. 292 26
Norris, Inc. v. N.L.R.B., 85 U.S. App. D.C. 106, 177 F. 2d 26 21
Peters v. Hobby, 349 U.S. 331 9
Red Canyon Sheet Co. v. Ickes, 98 F. 2d 308 (CADC) 14
Schwartz Laboratories, Inc., 89 NLRB 930 14
Service v. Dulles, 354 U.S. 363 9
Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943) 4, 10, 17, 19, 21, 22

IN THE

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OCTOBER TERM, 1957

No. 633

BOYD S. LEEDOM, ET AL., Individually and as Chairman and Members of and Constituting the National Labor Relations Board, *Petitioners*

v.

WILLIAM KYNE, Individually and as President of Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, A Voluntary Unincorporated Labor Organization, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF ENGINEERS JOINT COUNCIL AS AMICUS CURIAE

The Engineers Joint Council, with the consent of both parties in accordance with Rule 42(2), submits this brief amicus curiae to the Court in the genuine belief that it will aid the Court in the resolution of some of the questions presented by this case.

STATEMENT OF THE CASE

This case is before the Court on writ of certiorari to a decision of the Court of Appeals for the District of Columbia Circuit. The decision challenged by the National Labor Relations Board, petitioner in this case, affirmed a decree entered by Judge Matthews in the United States District Court requiring the Board to set aside a certification issued to a labor organization, respondent here. The decree further required the Board to conduct the representation election petitioned for by respondent in accordance with the statutory limitation prescribed by Section 9(b)(1) of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. Sec. 151, et seq.,) referred to herein as "the Act".

(a) The Board's Disputed Unit Finding

The decree of the District Court, whose jurisdiction is contested here, was directed at a certification resulting from a Decision and Direction of Election of the Board, dated May 28, 1956 (R. 11). Although respondent union had petitioned for a unit confined to professional employees in the Buffalo plant of Westinghouse Electric Corporation, the Board found that a larger unit was appropriate for collective bargaining within the meaning of Section 9(b) of the Act (R. 16-17). In enlarging the unit described in the petition, the Board included three employee classifications which were found by the Board itself to be non-professional (R. 16) and ordered an election over respondent's objections, in which employees in these classifications were permitted to vote. In the subsequent election, a majority of the employees voted for respondent union (R. 22) which was then certified as the rep-

resentative of a unit of employees coextensive with the unit found appropriate in the disputed Direction of Election (R. 19-20).

Subsection 9(b) of the Act, which gives the Board authority to "decide in each case . . . the unit appropriate for the purposes of collective bargaining" contains three limiting provisos.[1] One of these limitations, drawn to the attention of the Board in the administrative proceedings by respondent union, reads as follows:

> ". . . *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees, and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; . . ."

Notwithstanding, the Board even prior to any vote by the professional employees, placed the three admittedly non-professional classifications in the proposed bargaining unit on the ground that these employees shared a "close community of employment interests" with the professionals (R. 16).

(b) The District Court Injunction

After certification the respondent union filed a complaint for an injunction in the District of Columbia seeking to compel the members of the Board to set aside the direction of election, vacate the certification, and to refrain from processing the union's original petition except in accord with the limitations placed upon the authority of the Board by Section 9(b) (1).

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[1] The entire text of this subsection appears at pp. 40-41 of petitioner's brief.

The matter was heard on the Government's motion for dismissal or summary judgment and on the union's cross motion for summary judgment (R. 31). Thereafter the Court issued a decree, dated December 19, 1956, in which it granted the relief sought by respondent union and further ordered that the election petition be processed in such a way that the voting unit should not include both professional and non-professional employees (R. 32).

In its appeal the Board, although not expressly conceding error in the inclusion of non-professional employees in a professional bargaining unit, nevertheless did not challenge the holding of Judge Matthews that the Board disregarded the statutory limitations upon its authority in making such a unit finding (Bd. Br. below, p. 15).

(c) The Decision of the Court of Appeals

In affirming the judgment of the District Court, the Court of Appeals in an opinion written by Judge Bazelon rejected the Board's contention that its determinations in representation proceedings are reviewable only in the Court of Appeals and then only when they have become the basis for a final order in an unfair labor practice under Section 10. In that Court, as it does here, the Board contended that its position was sustained by *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943). The Court, however, held that the *Switchmen's* case was applicable only to such determinations as depended upon the Board's "expertise and discretion". It distinguished such cases from situations where the Board had violated an express statutory requirement—in this instance the provision in 9(b)(1)

—which expressly forbade the inclusion of professional and non-professional employees in the same unit, and where injury had occurred as a result of the Board's violation of the statute.

The Court held that in such cases the District Court had jurisdiction to grant relief, irrespective of whether or not the party injured might eventually have obtained a remedy under Section 10. The Court did note, however, that the possibility of relief under Section 10 was much too "remote and conjectural" to provide "an adequate remedy".

INTEREST OF ENGINEERS JOINT COUNCIL

The Engineers Joint Council has filed this brief because the issue involved is a matter of major concern to the entire engineering profession. The Council is an unincorporated association with offices in New York City, organized in 1945. It is in essence a federation of 14 engineering societies having an aggregate membership of more than 200,000, and represents the principal branches of the engineering profession in the United States.

This is only one of a series of cases involving the certification of engineering groups, in which the Board has disregarded those provisions of the Taft-Hartley Act insuring a separate ballot to professional employees.[2] It is estimated today that more than one-half of the 400,000 civilian engineers in the United States are employees of industrial corporations which are covered by the Act. Unless the District Courts have jurisdiction to restrain the Board from dilut-

[2] On p. 37 of the Board's brief, a number of these erroneous decisions are collected in a footnote.

ing the professional character of engineering bargaining units, direct judicial relief to the professional employees affected adversely thereby, is not available.

In the Wagner Act there were no safeguards against the inclusion of professional engineers in bargaining units of clerical, production or maintenance employees. This defect in the Wagner Act had long been a source of dissatisfaction in professional engineering circles. In 1947, it was largely upon the recommendation of a panel of national engineering societies, affiliated with the Council, that Congress included in the amendments to the Taft-Hartley Act the language of the first proviso in Section 9(b) and a definition of the term "professional employee" which appears in the present Act as Section 2(12), and reads as follows:

> "(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the results accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
>
> "(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a),

and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

At the time these proposals were made to Congress, E. Lawrence Chandler, appearing for the engineering societies before the Senate Committee on Labor and Public Welfare pointed out that because of technological developments most major industrial corporations had found it necessary to employ large staffs of professional engineers on a full-time basis (Hearings on S. 55, 80th Cong., p. 1704).

Mr. Chandler in his testimony also stated:

"To attempt application of the same standard of measurement for services of professional men and nonprofessional men is not in the public interest. The output of professional employees cannot be standardized as can that of manual and skilled labor. It cannot be measured in terms such as the number of brick a man should lay in a given number of hours, the number of cubic yards of dirt that should be moved, the square yards of painting, the amount of type to be set, bolts to be placed, feet of conduit to be laid, or in terms of any other similar unit.

* * * * * * * * *

"The background, education, training, and work interests of professional employees and nonprofessional employees are inherently divergent. It is futile to expect that a forced grouping of the professional and nonprofessional employees in any plant or organization could possibly form an 'appropriate bargaining unit'. Under present law and its administration, such plainly inappropriate groupings are made and, by fiat, are declared appropriate. We do not consider this to have been the intent of Congress.

"Some groups of professional employees have been recognized as appropriate bargaining units under existing laws, but usually such recognition has been accomplished only after long and costly controversy, entailing litigation and appeal and fundamental disturbance of employer-employee relationships. Frequently, however, professional employees have been grouped arbitrarily in heterogeneous bargaining units. In such cases the professional employees are usually a small minority in a large bargaining unit or trade union local, the majority of whose members have no community of thought or interest with professional employees. We believe that the law should be made so clear and explicit with regard to this matter as to eliminate the possibility of such groupings.

"Consideration by your committee is directed to three specific points which we believe are of fundamental importance for inclusion in any legislation which establishes standards for collective bargaining between employees and employer.

"(1) Any group of professional employees, who have a community of interest and who wish to bargain collectively, should be guaranteed the right to form and administer their own bargaining unit and be permitted free choice of their representatives to negotiate with their employer.

"(2) No professional employee, or group of professional employees, desiring to undertake collective bargaining with an employer, should be forced to affiliate with, or become members of, any bargaining group which includes nonprofessional employees, or to submit to representation by such a heterogeneous group or its designated agents.'"[3] (*Id.* p. 1705-06)

* * * * * * * *

[3] Mr. Chandler's third recommendation is irrelevant as it was not embodied in the bill which Congress ultimately enacted.

It was primarily on the basis of this testimony that Congress wrote into the Taft-Hartley Act the provisions in Sections 2 and 9 relating to professional employees.

SUMMARY OF ARGUMENT

Stripped of unessentials, the proposition which the Board is urging this Court to adopt is that the courts of the United States provide no judicial remedy for persons aggrieved by unit determinations which disregard an express provision of the Act. On its face, this proposition is not an appealing one. In recent years this Court, notwithstanding the absence of statutory provisions for judicial review, has repeatedly upheld the jurisdiction of district courts to grant relief to persons injured by administrative action.[4]

Without addressing itself directly to the general principle of the duty of the courts to provide redress against illegal and arbitrary actions of administrative agencies, the Board contends that any determination made in the course of a representation proceeding should be immune from judicial review. Its position is that while Section 10(e) and (f) of the Act do provide for judicial review in the courts of appeal, such review is limited to final orders of the Board in unfair labor practice proceedings. Consequently it urges that a certification of a union representative, not being a final order, is unreviewable. The legislative history

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[4] *Harmon* v. *Brucker*, — U.S. —, decided March 3, 1958, 26 LW 4166-67; *Peters* v. *Hobby*, 349 U.S. 331; *Service* v. *Dulles*, 354 U.S. 363; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123; and see also, *Leedom* v. *International Mine, Mill & Smelter Workers*, 352 U.S. 145; *Farmer* v. *United Electrical, Radio & Machine Workers*, 211 F. 2d 36, *cert. den.*, 347 U.S. 943.

of the Act and the decision of this Court in *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, are cited in support of this view. The Board also defends the determination, drawn into issue in this suit, as having a "rational basis", and hence should not be regarded as "wholly arbitrary agency action".

We submit that this argument is framed so as to blur the distinction between judicial review of the exercise of administrative discretion and the jurisdiction of the courts not only to set aside administrative action undertaken in plain disregard of a statutory limitation, but also to compel the agency to conform to the statute.[5]

Contrary to the Board's suggestion, what is involved here is a clear refusal of the Board to perform its functions in representation cases pertaining to professional personnel in accordance with the statute. The argument that the Board's treatment of the unit question was not "arbitrary" should not be entertained by this Court, as the District Court's finding to the contrary was not contested on appeal, and consequently the court below had no opportunity to pass on the question. Moreover, as we shall point out, the inclusion

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[5] Under the decree of the District Court the Board has been ordered to vacate the certification and to entertain and act upon the petition pursuant to the provisions of Section 9(c)(1). Insofar as relevant, Section 9(c) provides that "Whenever a petition shall have been filed . . . by . . . [a] labor organization . . . alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9(a) . . . the Board shall investigate such petition, and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice . . ."

of non-professional employees in the same bargaining unit with professional employees was expressly prohibited by the Act.

Under these circumstances, we submit that petitioners' objections to the decision of the court below are completely lacking in merit because (a) the immunity of representation proceedings from judicial scrutiny has no application to determinations which depart from statutory requirements; (b) neither the language nor legislative history of the Act precludes judicial relief where review provided by Section 10 is inadequate; and (c) such statutory provisions for review as the Act contains provide no adequate relief for labor organizations aggrieved by the kind of determination made in the instant case.

ARGUMENT

I. THE UNIT FINDING OF THE BOARD EXPRESSLY DEPARTED FROM THE REQUIREMENTS OF THE STATUTE.

As we have previously pointed out, the Board did not contest in the court of appeals the following finding of the district court (R. 30):

> "2. The defendants found that professional and non-professional employees together comprise a unit appropriate for purposes of collective bargaining without first conducting a separate election among the professional employees to determine whether a majority of them favor inclusion within a unit with non-professional employees. Section 9 (b) (1) of the Act states explicitly that "the Board *shall not* (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit. . ." (emphasis added). The Board has no

> statutory warrant to disregard this mandatory limitation upon its authority because in its view the commingling of professional and non-professional employees would not "destroy the predominantly professional character of such a unit," without conducting the requisite election in which a majority of such professional employees vote for inclusion in such unit. The refusal of defendants to conduct the required election works irreparable harm to the statutory right that an appropriate unit for collective bargaining purposes shall include only professional employees unless a majority of them vote for the inclusion of non-professional employees within the unit."

It is therefore somewhat surprising to find the Board in its brief, although disclaiming any such intention (Br. 34), advancing to this Court the very argument it made on the merits in the District Court.[6] Our position is that this portion of the Board's brief should be completely disregarded. It is obviously intended to detract from the force of the conclusion of the Court of Appeals that "this case presents Board violation of a statutory requirement and resulting injury", *Leedom* v. *Kyne*, 249 F. 2d 490, 491. If the Board had any doubt that this was precisely the situation which confronted the court below, it should have addressed its contention on rationality to the judges of that tribunal. In any event, the argument on this point merely discloses that the Board's departure from the statute was rational in the sense that it was deliberate rather than accidental.

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[6] Purporting not to argue the merits, the Board's excuse for including this argument is that it wished to show that its interpretation of Section 9(b)(1) had a "rational" basis.

An examination of the disputed Decision and Direction of Election (R. 16) reveals that the Board expressly found nine of the employees it included, were not professional employees within the meaning of Section 2(12) of the Act. The reason assigned for their inclusion was (a) they shared a close community of interest with the professional employees, and (b) these employees were included in the same unit under a 1946 Direction of Election at this very plant.

It is difficult to understand why the Board attached any importance to a unit finding in 1946, establishing a mixed unit of professionals and non-professionals. That finding was made one year before the Taft-Hartley amendments. Presumably it was this type of unit which the witness Chandler had in mind when he said:

> "It is futile to expect that a forced grouping of the professional and nonprofessional employees in any plant or organization could possibly form 'an appropriate unit' ".

Although the Board cited no precedent for including professional and nonprofessional personnel in the same unit, other than the earlier *Westinghouse* case, this is not the first time since the effective date of the amended Act that the Board has disregarded the literal language of Section 9(b)(1).

Shortly after the passage of the amended Act the Board directed an election in a unit composed of 81 professional engineers and nine other employees who were admittedly non-professionals. In that case (*Continental Motors Corp.*, 77 NLRB 345), as in this one, the percentage of non-professionals was relatively

small and the Board subsequently defended its decision on that ground.[1]

The *Continental Motors* case was not challenged in the courts. As a result of this assertion of discretion the Board proceeded in other representation cases thereafter to place much larger numbers of nonprofessionals in the unit, e.g., *Boeing Airplane Co.*, 86 NLRB 368 (26%); *Schwartz Laboratories, Inc.*, 89 NLRB 930 (29.1%); *Federal Telecommunications Laboratories, Inc.*, 92 NLRB 1395 (31½%).

The Board in its brief contends that the legislative history of the proviso to Section 9(b)(1) shows the propriety of including nonprofessional employees in a bargaining unit as long as such unit is predominantly professional. This argument is based on (1) some excerpts taken out of context from the House and Senate Reports on the bill, and (2) asserted Congressional ratification of this line of decisions.

It is a well settled principle of statutory construction, however that where the language of an Act is plain, the court should not inquire into the legislative history. *Bate Refrigerator Co.* v. *Salzberger*, 157 U.S. 1; *Red Canyon Sheet Co.* v. *Ickes*, 98 F. 2d 308 (CADC). It is apparent that the language forbidding the inclusion of professionals with nonprofessionals is crystal clear. Consequently it is unnecessary to review the hearings, committee reports or the floor debate to ascertain the meaning which Congress intended. But in any event, we submit that the legislative history,

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[1] Testimony of Chairman Herzog before Joint Committee on Labor-Management Relations (Hearings, pp. 1147-1148). In referring to this decision Mr. Herzog said: "I am not perfectly sure that the decision was 100% good law".

fragmentary as it is, affords no basis for the contention that Congress did not intend a flat prohibition of any heterogeneous bargaining units.

The cited testimony of the witness Chandler reveals that the engineering societies proposed the present language of the Act, not merely because professional employees could be out-voted by other employees if placed in a general bargaining unit, but also on the ground that "the background, education, training and work interests of professional employees and nonprofessional employees" are so "inherently divergent" that "a forced grouping" cannot "possibly form an appropriate bargaining unit".

If all that Congress had been concerned with was the possibility that a nonprofessional majority could outvote a professional minority, it would have been simple to have stated the proviso in Section 9(b)(1) as a limitation upon the Board's power to lump professionals and nonprofessionals together unless the former constituted a majority of the proposed unit. This is not what Congress did, yet the Board has acted as if Congress had formulated such language.

It is true that the committee reports respecting Section 9(b)(1) do advert to the need for giving professional employees protection against having their freedom of choice overridden by larger occupational groups but none of these reports suggests in any way that this was all that the proposed amendment would accomplish. The Senate Report, for example, accordingly describes Section 9(b)(1) as follows:

> "The several amendments to this subsection propose to limit the Board's *discretion* in determining the kind of unit appropriate for collective bargain-

ing: (1) the Board is *prohibited* from including professional employees in units with other employees unless they first vote in favor of such inclusion". (S. Rept. No. 15, I. Legislative History, Labor-Management Relations Act, 1947, GPO, p. 431). [Emphasis supplied]

Moreover, the Board defense of its current practices also overlooks the fact that even the inclusion of a relatively small number of nonprofessionals in a "predominantly professional unit" carries with it the very real danger that if the professionals are closely divided the votes of the nonprofessionals might well result in an election not reflecting the will of the majority of the professional group.

The post-legislative history to which the Board points has even less significance. The fact that the Joint Committee did not recommend overruling the *Continental Motors* doctrine cannot be construed as Congressional approval, for Congress never acted upon even the recommendations made by the Joint Committee. In fact since 1947, Congress has never undertaken any comprehensive revision of the National Labor Relations Act.[8]

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[8] The Board offers the novel suggestion (Br. 23, n. 13) that a union aggrieved by a Board determination has a remedy even though it is denied access to the courts, viz., corrective action by Congress. It is difficult to believe that this argument was seriously advanced. Under its logic it would seem unnecessary for the courts ever to concern themselves with questions of statutory construction by administrative agencies because Congress in theory can always enact legislation overruling them. It should also be noted that the Joint Committee on Labor-Management Relations, to which the brief refers as a method of facilitating "legislative oversight" went out of existence on January 2, 1949 under the terms of the Title creating it (Sec. 403, Labor-Management Relations Act, 1947, 29 U.S.C. 1946 Ed. Supp. 5, 191).

2. AGENCY ACTION IN VIOLATION OF STATUTE CONFERS JURISDICTION ON DISTRICT COURTS.

(a) Representation Proceedings Are Immune From Judicial Scrutiny Only Where Challenge to Agency Is Directed to Issues in Which Agency Is Vested With Discretion.

The Board's main thesis is that the failure of Congress to provide expressly for judicial review of certifications discloses an intention to preclude review of representation determinations under any circumstances. It asserts that *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 97, is dispositive of this issue.

But the *Switchmen's* case is no authority for the proposition that where the Board clearly departs from statutory requirements in representation proceedings, the district courts are without power to restrain it. In the *Switchmen's* case the union which brought the action did not contend that the Mediation Board had disregarded any plain statutory limitation upon its powers. It seems appropriate at this point to describe the precise issue the plaintiff in that case raised.

Under subdivision 9 of Section 2 of the Railway Labor Act (U.S.C.A. Title 45 § 152) the Board had certified after a systemwide election in the New York Central Railroad, the Brotherhood of Railroad Trainmen as the representative for all the yardmen. The Switchmen contended that in certain divisions of the system, separate votes should have been taken of the yardmen. [Presumably had the Mediation Board conducted an election in divisional units rather than in a system unit, the plaintiff union might have obtained a majority in some divisions.] The object of the action was cancellation of the certificate to the rival labor organization.

In holding that Congress intended certifications under the Railway Labor Act to be unreviewable, the court did attach some weight to the absence in the statute of any express provisions for judicial review with respect to certifications. It did not regard this feature of the Railway Labor Act as conclusive, however, for it said:

> "Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may nonetheless be supplied". (Id., 320 U.S. 301)

The court then noted that the authority conferred by Congress upon the Mediation Board in election disputes was to interpret the meaning of the terms "craft" or "class". Id., 320 U.S. 305. As neither term was defined in the statute, it is therefore obvious that what the Switchmen's Union was assailing was an exercise of judgment rather than a departure from the letter of the statute.

The Board argues that the Switchmen's case is "precisely in point" because there is an analogous statutory scheme in its own Act. It may be conceded that the opening sentence in Section 9(b) of the Labor Relations Act which grants wide discretion to the Board in deciding whether employer units, plant units, craft units or subdivisions thereof, are appropriate, does indeed bear a close resemblance to the section in the Railway Labor Act authorizing another administrative agency to certify the representatives of the craft or class involved in a representation dispute—the very section drawn into issue in the *Switchmen's* case.

In both situations Congress has given the respective administrative agencies wide latitude for judgment in

the certification of bargaining units. Consequently even where judicial review is authorized, the courts have been reluctant to substitute their judgment for that of the administrative agency. *Mueller Brass Co.* v. *N.L.R.B.*, 86 U.S. App. D.C. 153, 180 F. 2d 402. Thus, to quote from the Supreme Court in the *Switchmen's* case, "the type of problem inolved" was evidence that the discretionary powers of the Board were not intended to be the subject of judicial review.

But the analogy between Section 9(b) and the corresponding language of the Railway Labor Act completely breaks down when it is carried into the various provisos to Section 9(b), enumerating the areas in which Congress deprived the Board of agency discretion. Obviously if the Railway Labor Act had expressly declared that certifications could be made only in separate divisions of a railroad system the "type of problem" the court had before it in the *Switchmen's* case would have been entirely different, for it is the traditional function of a reviewing court to see to it that administrative authority is exercised within express statutory limitations.

Simlarly, we are not concerned here with any question of interpretation or exercise of discretion by the Board. The first proviso to Section 9(b) makes it plain that the Board may not decide that any unit is appropriate if it includes both professional and nonprofessional employees "unless a majority of such professional employees vote for inclusion in such unit". There is nothing in the Act to indicate, nor is it reasonable to infer that Congress intended to grant to the Board, power to repeal an express provision of the Act and thus relieve itself of the affirmative duty imposed upon it by Section 9(b)(1).

The distinction between agency construction of a statute and agency discretion is not a novel one. Congress itself adverted to this distinction in Section 10 of the Administrative Procedure Act (5 U.S.C. § 109). This section confers a right of judicial review to any person suffering legal wrong because of any agency action "except so far as . . . agency action is by law *committed to agency discretion*". [Emphasis supplied.]

(b) Congress Did Not Intend to Preclude Judicial Relief Where Review Provided by Section 10 Was Inadequate.

The Board bolsters this argument by reference to the legislative history of both the original and amended Acts. Its reading of this history, however, is undiscriminating because it fails to take into account the context of judicial decisions in which Congress in 1947 amended the original act. It calls attenton to the decision of this Court in *American Federation of Labor* v. *N.L.R.B.*, 308 U.S. 401, 409-11, where reference was made to the Senate committee's explanation of the limited provision for review of representation cases in Section 9(d) of the Wagner Act. All that the Court held in that case, however, was that Sections 10(e) and (f) limited review in the courts of appeal to unfair labor practice orders. The court expressly left open the question of whether a union aggrieved by Board action in a representation case might have recourse to the district courts.

Earlier the Court had indeed held that employers could not obtain injunctive relief in the district courts against proceedings by the Board, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. The reason assigned was:

"Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the circuit court of appeals".

This doctrine was developed by the courts of the District of Columbia circuits so as to bar employers from access to the district courts to challenge a certification. In *Norris, Inc.* v. *N.L.R.B.*, 85 U.S. App. D.C. 106, 177 F. 2d 26, it was pointed out that all that an employer, assertedly aggrieved by a certification had to do, was to ignore the certification and let the union file a refusal to bargain charge. Under such circumstances the employer could not be compelled to bargain with the certified union until he was afforded a hearing before the Board and judicial review in a court of appeals under either Section 10(e) or 10(f) of the Act.

The courts recognized, however, that this avenue of attacking a certification collaterally in an unfair labor practice proceeding was not available to unions under the Wagner Act, as unfair labor practices could be committed only by employers. Undoubtedly it was this consideration which caused this Court in the *American Federation of Labor* case to reserve the question of district court jurisdiction over certain representation issues.

In 1945, despite the intervening *Switchmen's Union* case, this Court again adverted to the question left open in the *American Federation of Labor* opinion, *Inland Empire Dist. Council* v. *Millis*, 325 U.S. 697. In this case a carpenters local challenged the procedure in a representation case which had resulted in the election and certification of a rival union, on the ground

that the only hearing accorded it by the Board occurred after the election was held.

If the Board were correct in its thesis that the *Switchmen's* case stood for the proposition that all judicial review of certifications was precluded, the Court might well have dismissed this petition in a *per curiam* order. The Court, however, noting that the courts of appeal of the various circuits were divided, 325 U.S. 697-700, n. 1, on the issue of jurisdiction, remarked upon the obvious importance of the question and went on to restate its previously announced view that the question of whether the Wagner Act precluded judicial review of a certification under Section 9(c) in an independent suit brought under Section 24 of the Judicial Code, could be "appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy".

The Court then proceeded to consider the merits of the case and reached the conclusion that a post-election hearing satisfied the statutory requirements and hence there had been no showing of unlawful action by the Board.

It was against this background that the Taft-Hartley Act was written in 1947. The Board professes to find in the rejection by the conferees of a provision in the House bill making certifications subject to judicial review, a clear Congressional intent to deprive district courts of jurisdiction to consider any aspect of a representation case. A more discriminating examination of the rejected amendment, however, and Senator Taft's subsequent explanation, show that there is no foundation for so broad an inference.

The House bill had amended Section 10(f) of the Act so as to put certifications and final unfair labor practice orders of the Board on the same footing so far as petitions for review were concerned. Had the amendment been accepted it would have meant that the courts of appeal of the various circuits would have been under a duty to decide not only whether certifications departed from statutory requirements but also whether the underlying findings on which the certification was based, were supported by substantial evidence. Undoubtedly such broad review in representation cases could have led to "dilatory tactics". This was the specific problem that Senator Taft was concerned with in the statement quoted in petitioners' brief (pp. 21-22).

There is nothing to suggest, however, that in formulating the Taft-Hartley Act Congress intended to deprive litigants of any rights recognized by the courts under the Wagner Act, to obtain relief against illegal representation determinations in the district courts. In other words, Congress did nothing to settle the conflict of authority in the different circuits which had caused this Court to grant certiorari in *Inland Empire*.[9] Thus, the action of the conferees in rejecting the House amendment does not possess the significance the Board would now attach to it.

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[9] No assumption can be made that Congress was unaware of the *Inland Empire* case, as it specifically amended Section 9 so as to require the Board to hold hearings prior to elections rather than after them. See Sen. Taft's summary of Conference Report, 93 Cong. Rec. 6601; II Legis. Hist. 1542. See also, 93 Cong. Rec. 664; II Legis. Hist. 158203. In sum, Congress was at pains to amend the statute so as to obviate the construction placed on Section 9 by this Court, but let stand the Court's observations on district court jurisdiction.

The Board also relies upon Congressional inclusion in the 1947 amendments of Sections 10(1) and 10(j) which empower the district courts to grant temporary injunctive relief against certain kinds of unfair labor practices. It is argued that the inference should be drawn, so far as the Labor Relations Act is concerned, that Congress intended to limit the role of the district courts to these particular subsections. But there is no basis for any such inference.

Prior to the Taft-Hartley Act Congress had already passed Section 24 of the Judicial Code, now 28 U.S.C. § 1337, and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009. The jurisdiction of the district courts to grant relief here depends upon these provisions. A subsequent grant of power to the district courts to exercise ancillary functions in connection with the Act, can scarcely be construed as an implied repeal of preexisting jurisdiction.

(c) Such Review as Section 10 Provides Would Afford No Relief to Respondent.

Although the cases denying district courts jurisdiction to review representation determinations have generally turned on the adequacy of statutory judicial review under Sections 10(e) and (f) of the Act, *Myers* v. *Bethlehem Shipbuilding Corp., supra; Norris, Inc.* v. *N.L.R.B., supra,* the Board is contending that even though the Court should hold that this method of obtaining review would not be open to respondent here or to other employees or unions similarly situated, the district courts should not be permitted to fill this vacuum. As the Board in a footnote does suggest, however, that there is a method by which the union here

could obtain review of the certification, it seems appropriate to analyze this facet of its position.

According to the Board, Section 8(b)(3) which makes it an unfair labor practice for a certified union to refuse to bargain, creates a device under which a labor organization, like an employer, can test the validity of a certification unilaterally by declining to bargain. Under this ingenious scheme the certified union could refuse to bargain with Westinghouse except on the basis of representing only the professional employees. Since this would be tantamount to refusal to bargain in the unit found appropriate, the union then would be vulnerable to a charge of violating Section 8(b)(3). If a complaint were issued on this basis, the Board could then frame an unfair labor practice order requiring the union to bargain with all the employees in the certified unit. In this posture of the case the union could file a petition for review under Section 10(f) of the Act, and thus obtain circuit court scrutiny of the certification.

In the court below, where petitioner made a full dress argument on this point, the court found that the possibility of such a remedy was inadequate as the employer, not being aggrieved by the Board's inclusion of the non-professional employees, would have no motive for filing a charge, as he would then be free to deal with the employees individually.

The Court also thought it "remote" that any of the nine non-professionals would file unfair labor practice charges as they were "hardly likely to insist upon placing their faith in the hands of a reluctant bargaining representative". The authors of the Board's brief state that they believe "the court's assumption is un-

warranted, particularly insofar as the filing of charges by the nine non-professionals is concerned".

We submit that the observations of the court were well taken. The record of the representation proceedings shows that it was the competing union which took the position at the hearing that the employees in the non-professional categories should be included (R. 13). Presumably, these employees were adherents of the rival union and thus would have little or no reason to attempt to force respondent union to represent them.

Moreover, as the court pointed out, Westinghouse would have no motive for filing a charge. Yet, in order to perfect their charge the non-professional employees would need the collaboration of Westinghouse, because, as this Court has held, there is no duty to bargain except upon the request of the opposite party. *N.L.R.B.* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292.

Since the Taft-Hartley Act, this Court has already sustained a district court injunction preventing the Board from departing from statutory requirements in representation proceedings, *Leedom* v. *International Mine, Mill & Smelter Workers*, 352 U.S. 15. The Board argues now that this case should not be considered a precedent because jurisdictional arguments were not made in this Court, although the issue of lack of jurisdiction had been raised below. This contention reveals an odd approach to litigation policy. If the Board's position in this case is upheld, it would appear that despite the *Mine, Mill & Smelter Workers* case,[16] there would be no ju-

[16] See also, *International Maritime Union* v. *Herzog*, 334 U.S. 854.

dicial obstacle in the future to the Board's adopting whatever construction it pleased with respect to the filing requirements of the Act embodied in Sections 9(f)(g) and (h) insofar as they refer to representation cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals be affirmed.

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